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RELIGIOUS MEETINGS ON PUBLIC SCHOOL PROPERTY: THE CONSTITUTIONAL DIMENSIONS OF CHURCH-STATE NEUTRALITY

I. INTRODUCTION

The public schools and universities have never been immune from conflict between competing interpretations of basic federal constitutional guarantees.¹ With respect to freedom of religion, however, the public campus has been the principal battleground for controversies which have hammered out the contours of the relationship between church and state.

It is therefore not surprising that the most recent chapter in the church-state controversy involves the public campus itself. An increasing number of recent suits in state and lower federal courts have presented the question of whether public educational institutions² may constitutionally permit religious groups the use of unoccupied buildings, facilities, or grounds for religious purposes during noninstructional hours.³ These cases have arisen in three related contexts: (1) university level religious students have sought the use of state university or college campus facilities to conduct voluntary student meetings for purposes of prayer, religious study, or fellowship, either informally or as a recognized campus club;⁴ (2) high school level reli-

1. See, e.g., *Healy v. James*, 408 U.S. 169 (1972) (state college may not, consistently with association rights of students, withhold official recognition of a student organization because of its parent organization's history of disputatious activities); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (wearing of armbands by public senior and junior high school students in protest to Vietnam War held to be protected expression, absent evidence of likelihood of substantial disruption or material interference with school activities); *Brown v. Board of Educ.* 347 U.S. 483 (1954) (segregation of children in public schools solely on basis of race, though races accorded substantially equal facilities, held to deny minority group children equal protection of the laws in violation of fourteenth amendment).

2. The term "public" as used herein means tax supported. The generic term "public school" is intended to embrace both tax supported high schools and tax supported colleges or universities. The two are differentiated herein only where the courts have differentiated the issues in respect to each.

3. Alternatively, it might be asked whether such institutions may constitutionally *deny* religious groups use of school facilities. See *infra* text accompanying notes 231-37.

4. E.g., *Dittman v. Western Wash. Univ.*, No. 79-1189 (W.D. Wash. Feb. 28, 1980) (memorandum opinion) (holding use of public university buildings for weekly religious meetings unconstitutional), *vacated as moot*, No. 80-3120 (9th Cir. Mar. 30, 1982); *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980) (holding denial of right to hold religious student

gious students have sought to use unoccupied public high school facilities for meetings, and to form Bible study groups recognized and supervised by the school administration, or to form other less formal clubs;⁵ and (3) religious congregations have sought the temporary use of unoccupied public school buildings after school hours or on weekends for worship services and religious instruction.⁶

In all three contexts, the public school facilities were not otherwise utilized for any public purpose during the period of use by the religious groups. In addition, in each circumstance, the public school had opened up its facilities on an otherwise evenhanded basis to nonreligious student groups as part of a policy of encouraging formation and conduct of student groups to promote social and cultural awareness, or had made available its facilities to nonreligious community groups as part of a policy of maximizing use of tax supported facilities for the benefit of the entire community. However, in each case, religious groups were denied the same privilege to use the facilities.

With the factual stage thus set, the most interesting aspect of these battles emerges: the principal adversaries' choice of constitutional sword. State school officials have conceived these cases to be controlled by the principle of separation between church and state as embodied in the first amendment's "establishment clause."⁷ As grounds for denial, officials have argued that any activity on the tax supported campus which fairly may be characterized as "religious" violates the establishment clause and must, on that ground, be resisted.

The religious groups, on the other hand, have conceived these cases as controlled by federal constitutional guarantees of freedom of

meetings on university campus unconstitutional), *aff'd sub nom.* *Widmar v. Vincent*, 102 S. Ct. 269 (1981); *Keegan v. University of Del.*, 349 A.2d 14 (Del. 1975) (holding use of commons room of university dormitory facilities for religious services constitutional, and denial unconstitutional).

5. *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980) (holding that high school students' use of unoccupied school room for voluntary prayer meetings before commencement of classes would be unconstitutional); *Trietley v. Board of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978) (holding that proposed student Bible study club would be unconstitutional); *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (holding that permitting Bible study club to meet on public high school campus during school day was unconstitutional), *cert. denied*, 434 U.S. 877 (1977).

6. *Resnick v. East Brunswick Township Bd. of Educ.*, 77 N.J. 88, 389 A.2d 944 (1978) (holding religious congregation's temporary use of public school buildings at rental rate returning out-of-pocket costs of school board constitutional); *Southside Estates Baptist Church v. Board of Trustees*, 115 So. 2d 697 (Fla. 1959) (holding the temporary use of public schools by church congregation, pending construction of church facilities, constitutional).

7. U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law respecting an establishment of religion"

speech,⁸ freedom of religion,⁹ freedom of association,¹⁰ and equal protection of the laws.¹¹ They typically claim only the same rights enjoyed by nonreligious student or community groups to associate on campus to further their beliefs or goals. Another typical argument is that the withholding of such rights, based on religious status, discriminates unreasonably and places a stigma upon religious groups and upon religion generally.¹²

The questions raised by the religious use of public school property are significant because they place in sharp contrast—perhaps as no other freedom of religion cases have—competing views of the proper constitutional philosophy regarding church and state. For example, is the issue merely that of church versus state, or is the issue a problem of individual rights? How the issue is characterized may betray wider differences in basic philosophy regarding the extent of permissible religious activity whenever state and religion interface.

The United States Supreme Court has had no occasion to rule on the constitutionality of voluntary religious meetings by religious groups on public school property during noninstructional hours.¹³ The state

8. U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech" The right to freedom of speech was made applicable to the states through the "liberty" provision of the due process clause of the fourteenth amendment. *Gitlow v. New York*, 268 U.S. 652 (1925) (in sustaining conviction under state criminal anarchy statute, Court assumed that the fourteenth amendment's due process clause guaranteed freedom of speech).

9. U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof" Within this quotation are found both of the religion clauses: the establishment clause and the free exercise clause. The Supreme Court assumed that both religion clauses were applicable to the states through the fourteenth amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating under free exercise clause state statute regulating solicitation for religious or charitable causes as applied to member of religious sect). The Court later specifically held the establishment clause to be applicable to the states in *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (upholding under establishment clause state statute authorizing reimbursement to parents of funds expended to transport their children to church related schools).

10. Though freedom of association is not expressly identified in the Constitution, the freedom to engage in association for the advancement of ideas was held to be implicit in the due process clause of the fourteenth amendment. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (holding state could not compel national association to reveal membership list of state members).

11. U.S. CONST. amend. XIV provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

12. *See Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980) (holding that high school students' use of unoccupied school room for voluntary prayer meetings before commencement of classes would be unconstitutional).

13. *But see infra* notes 281-321 and accompanying text.

and lower federal courts which thus far have ruled on the question have reached widely divergent conclusions.

This comment addresses the federal constitutional questions presented¹⁴ by the use of public school facilities by religious high school and university students for religious activity and proposes some answers to these questions.¹⁵ It reviews the religious meetings cases,¹⁶ first, from the viewpoint of the establishment clause as interpreted by the Supreme Court, and second, from the perspective of individual rights. Finally, it suggests a means of reconciling these apparently conflicting constitutional guarantees.

II. GOVERNING PRINCIPLES

The use of public school property for religious purposes is not novel to American life or law. For most of the nation's history, such use rested upon the common consent of local communities.¹⁷ While a number of reported cases can be found in which aggrieved parties brought challenges to such use on state law grounds,¹⁸ the first federal constitutional challenge to such use was not adjudicated until 1959. Thereafter, the Supreme Court developed a substantial body of case law interpreting the first amendment's establishment clause and its application to the states.¹⁹

A. The Establishment Clause: The Wall of Separation Between Church and State

The clause against establishment of religion by law²⁰ was in-

14. While this comment is restricted to the federal constitutional questions, attention is drawn to the fact that numerous states have common law, statutory, or state constitutional provisions governing the legality of permitting religious use of public school property, or conditioning its use. See, e.g., *Resnick v. East Brunswick Township Bd. of Educ.*, 77 N.J. 88, 96-100, 389 A.2d 944, 949-52 (1978). Thus, unless it is held that banning religious meetings abridges students' federally protected rights to freedom of speech and association, free exercise, or equal protection, states are free to fashion restrictions which effectively raise the wall of separation between church and state higher than the establishment clause requires.

15. See *infra* notes 238-79 and accompanying text.

16. The phrase "religious meetings" as used herein means the voluntary use of public high school or university property by a religious student group for religious purposes.

17. Annot., 79 A.L.R.2d 1148, 1150 (1959).

18. See C. ZOLLMAN, *AMERICAN CIVIL CHURCH LAW* 33-35 (1969).

19. The first case deciding federal constitutional questions in the context of use of public school property by religious groups was *Southside Estates Baptist Church v. Board of Trustees*, 115 So. 2d 697 (Fla. 1959) (holding the temporary use of public school facility by religious congregation constitutional). The case arose twelve years after the Supreme Court's first establishment clause case, *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

20. See *supra* note 7.

tended, in the famous phrase of Thomas Jefferson, to erect "a wall of separation between church and State."²¹ In deciding cases under this provision, the Supreme Court has occasionally resolved the issues with one eye on the historical significance of the religion clauses.²² However, since history discloses no clear meaning to the sparse provisions,²³ the Court has chosen to "find" its own "historic principles."²⁴ Thus, in *Everson v. Board of Education*,²⁵ the first establishment clause case, the Court stated that the clause prohibited more than government support of an official state church:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may

21. *Reynolds v. United States*, 98 U.S. 145, 164 (1879). The phrase is an unfortunate one because it implies that all governmental action can be neatly stacked on one side of the wall or the other. Moreover, the metaphor is not infrequently offered as a substitute for analysis. While one might well wish for its overdue demise, the phrase is so clearly a part of the American vocabulary that it appears to be here to stay.

22. *E.g.*, *Everson v. Board of Educ.*, 330 U.S. 1, 8-14 (1947); *id.* at 33-43 (Rutledge, J., dissenting).

23. It is at least clear that the amendment was in part the result of religious persecution during the colonial period, when the English Crown granted colonial charters in exchange for the erection of the Anglican Church as the official, established religion and exacted taxes in support of the church from colonists—regardless of individual personal beliefs. *Id.* at 9-10. After the American Revolution state support of religion continued to flourish. *Id.* at 11. James Madison published his well known *Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in *Walz v. Tax Comm'n*, 397 U.S. 664, 719-27 (Douglas, J., dissenting), in which Madison warned of the evils accompanying state supported religion. *Id.* Having aroused sufficient public support, Jefferson and Madison successfully opposed the taxing policy of the Virginia Legislature. *Everson v. Board of Educ.*, 330 U.S. at 12. Eventually, Madison's efforts and influence in the First Congress produced the religion clauses of the first amendment. *Id.* at 39.

However, many states maintained close ties with religion, and supposed that the amendment was only a limitation on the power of the federal government, *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), thus arguably confirming state sovereignty over religion. See generally C. ANTIEAU, A. DOWNEY & E. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT* (1964).

24. For example, the Supreme Court declared that in erecting the wall of separation, the framers acted upon the belief "that a union of government and religion tends to destroy government and to degrade religion. When government . . . allies itself with one particular form of religion, the inevitable result is that it incurs the 'hatred, disrespect and even contempt of those who hold contrary beliefs.'" *Abington School Dist. v. Schempp*, 374 U.S. 203, 221-22 (1963) (citations omitted) (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)).

25. 330 U.S. 1 (1947).

adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.²⁶

Not all state action which provides benefits to religion is prohibited by the establishment clause.²⁷ In drawing the line between permissible and impermissible benefits, the Court, in subsequent decisions, declared that the principle governing state action under the establishment clause is "neutrality": government must be neutral in its relations with believers and nonbelievers.²⁸ To measure state action against establishment clause prohibitions, the Court has evolved a tripartite test which, as summarized in *Lemon v. Kurtzman*,²⁹ purported to be a synthesis drawn from criteria developed by earlier decisions. To pass muster, governmental action must (1) reflect a clearly *secular purpose*; (2) have a *primary effect* which neither advances nor inhibits religion; and (3) not foster *excessive governmental entanglement with religion*.³⁰

1. Secular purpose requirement

To satisfy the *secular purpose* requirement of the *Lemon* test, governmental action need only have an arguably secular design, as illustrated by the Supreme Court's "aid to parochial schools" cases.³¹ In

26. *Id.* at 15-16.

27. See generally *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

28. *E.g.*, *Roemer v. Board of Pub. Works*, 426 U.S. 736, 745-46 (1976) (plurality opinion); *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963). The Court is aware that its decisions applying the neutrality principle are not easily reconcilable: "Of course, that principle is more easily stated than applied." 426 U.S. at 747. "[C]andor compels the acknowledgement that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication." *Tilton v. Richardson*, 403 U.S. 672, 678 (1971) (plurality opinion). It appears, in fact, that the Court has deliberately chosen a flexible, *ad hoc* approach. See *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) ("The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions . . .").

At no time has a majority of the Court reached a clear consensus as to the boundaries of the neutrality principle. Even within a single opinion the Court's more stridently anti-religious rhetoric may be difficult to reconcile with its conclusions. See generally *Zorach v. Clauson*, 343 U.S. 306 (1952).

29. 403 U.S. 602 (1971) (invalidating state program involving payments to religious primary schools) (hereinafter referred to as the "*Lemon* test").

30. *Id.* at 612-13. The Court first announced the "secular purpose" and "primary effect" tests in *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963). In *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970), the Court added the "excessive entanglement" requirement. The *Lemon* test is not to be viewed as a precise formula, but as containing "guidelines" with which to identify instances when the neutrality objective of the establishment clause has been compromised. *Meek v. Pittenger*, 421 U.S. 349, 358-59 (1975).

31. See *Meek v. Pittenger*, 421 U.S. 349 (1975) (furnishing of "auxiliary services" such

these cases, the Court found secular purposes behind state programs which provided a wide variety of materials and other assistance to students in all private schools. Each program was explained to be a species of general welfare legislation designed to benefit broad classes of persons, among which were numbered religious schools. In view of the broad meaning accorded this requirement, the first prong of the *Lemon* test is seldom an issue in establishment clause cases.³²

Nearly all of the reported cases which have applied the *secular purpose* requirement to religious meetings have found secular purposes behind state action making school facilities available to a broad class of groups, of which religious groups were merely a part. Thus, permitting Bible study clubs or prayer meetings on public high school campuses, where such action is taken pursuant to a policy of permitting formation and meetings of all student groups, has been held to have the secular purpose of promoting student intellectual development and social and cultural awareness.³³

2. Primary effect requirement

Governmental action which fosters a secular purpose may yet run afoul of the second requirement of the *Lemon* test if it has a *primary*

as testing, counseling, speech and hearing therapy to children in private schools has secular purpose of assuring that children have opportunity to develop intellectually and socially); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (payment of salary supplements to private school teachers has secular purpose to promote education of children); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (grant of property tax exemption to class composed of non-profit, quasi-public entities such as hospitals, libraries, and patriotic groups, including church property used solely for religious worship, has secular purpose to avoid inhibiting beneficial and stabilizing influence of entities which foster the moral or mental improvement of community); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (free loan of secular textbooks to all private schoolchildren has secular purpose of promoting education of children); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (reimbursing parents for bus fare to transport their children to both public and private schools, including sectarian schools, has private purpose of promoting education of children).

32. *But see Epperson v. Arkansas*, 393 U.S. 97 (1968) (religious purpose found in law making it unlawful for teachers in public schools to teach a theory of human biological evolution); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (religious purpose found in law requiring reading of ten verses from the Bible and recitation of the Lord's Prayer at commencement of each school day).

33. *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980) (prayer meetings in unoccupied school room prior to commencement of classes); *Dittman v. Western Wash. Univ.*, No. 79-1189 (W.D. Wash. Feb. 28, 1980) (memorandum opinion) (permitting access to university buildings for religious discussions), *vacated as moot*, No. 80-3120 (9th Cir. Mar. 30, 1982); *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977) (certiorari denied on ground that petition was not from final judgment). *But see Trietley v. Board of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978) (religious purpose found in holding Bible study clubs on public high school campus).

effect either of advancing or inhibiting religion.³⁴ The Supreme Court has defined impermissible "advancement" as the "sponsorship, financial support, and active involvement of the sovereign in religious activity."³⁵ Thus, a finding of *affirmative sponsorship* or ostensible endorsement of religious activity, on the one hand, or *direct financial support* in aid of religious activity, on the other hand, constitutes impermissible advancement of religion.

a. affirmative sponsorship or ostensible endorsement

This comment will first consider what factors or elements lead to the legal conclusion that government is affirmatively sponsoring or ostensibly endorsing religion, as distinguished from merely accommodating religion. Next, the religious meetings cases will be analyzed in light of these standards.

i. elements of affirmative sponsorship and ostensible endorsement

That a public school may not directly sponsor religious activity was first established in *Illinois ex rel. McCollum v. Board of Education*.³⁶ In *McCollum*, the Supreme Court reviewed an Illinois program in which religion teachers entered public school classrooms during the school day once a week to provide religious instruction to pupils who had voluntarily enrolled in religion classes. The religion teachers were employed by private sectarian groups but reported to school authorities.³⁷ Students who did not enroll in religion were released to continue their secular education in another part of the school.³⁸ While the Court employed no formal test to invalidate this so-called "released time" program, it emphasized that the program involved the use of both tax supported public buildings and state compulsory attendance laws.³⁹

34. See *supra* text accompanying note 30. The Supreme Court has cautioned that the word "primary" should not be taken literally because inquiring into a hierarchy of effects would involve the Court in impossible "metaphysical judgments." *Committee For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 783-84 n.39 (1973). The Court declared that "a law found to have a 'primary' effect to promote some legitimate end under the State's police power is [not] immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion." *Id.*

35. *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

36. 333 U.S. 203 (1948).

37. *Id.* at 205.

38. *Id.* at 209.

39. Parents were required by law to send to school their six to sixteen year old children. *Id.* at 205. The Court did not state precisely how compulsory attendance laws were coercive, since attendance at the religious instruction sessions was not compelled; the opinion merely noted that students who did not desire to participate were nevertheless compelled to remain at school in some other area. Presumably, the evil was thought to be that the reli-

Moreover, the program effected a union of religious groups and school authorities in promoting religious instruction.⁴⁰

The clearest case of affirmative sponsorship was presented by a challenge to the New York public school system's Regent's Prayer in *Engel v. Vitale*.⁴¹ In *Engel*, the New York Board of Regents had composed an official "non-denominational" prayer⁴² which a local board of education required to be recited daily in each class.⁴³ The Supreme Court declared that the establishment clause "must at least mean that . . . it is no part of the business of government to compose official prayers . . . as a part of a religious program carried on by government."⁴⁴ In response to the argument that the prayer should be permitted because it was denominationally neutral and recitation was voluntary, the Court answered that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."⁴⁵

Finally, in *Abington School District v. Schempp*,⁴⁶ the Court struck down Pennsylvania and Maryland statutes which required that each school day commence with a reading, without comment, of verses from the Bible.⁴⁷ The exercises commenced with the reading of ten verses, followed by a recitation of the Lord's Prayer, and closed with the flag salute. The public school teacher had discretion to choose the passages,

gious program, in effect, came to the student, who bore the burden of removing himself from its influence if he did not wish to participate. In such a situation the momentum of the overall school program is placed behind the religious instruction, producing a subtle, coercive effect. *See infra* text accompanying note 55.

40. 333 U.S. at 209-10.

41. 370 U.S. 421 (1962).

42. "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422. These state officials published the prayer as part of their "Statement on Moral and Spiritual Training in the Schools," stating: "We believe that this statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program." *Id.* at 423.

43. *Id.* at 422. The parents of ten pupils challenged both the state law authorizing the school district to direct the use of prayer in public schools and the school district's regulation ordering recitation of the particular prayer.

44. *Id.* at 425.

45. *Id.* at 431.

46. 374 U.S. 203 (1963).

47. The Pennsylvania statute, PA. STAT. ANN. tit. 24 § 15-1516 (Purdon 1949) (amended 1959), provided in part: "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." 374 U.S. at 205. The Maryland statute, MD. ANN. CODE art. 77, § 202 (repealed 1978), prescribed similar opening exercises. 374 U.S. at 211-12.

and students took turns reading aloud. In invalidating the programs, the Court emphasized that the state was conducting a religious, devotional ceremony.⁴⁸ In addition, the exercises were "prescribed as part of the curricular activities of students who are required by law to attend school. They [were] held in the school buildings under the supervision and with the participation of teachers employed in those schools."⁴⁹ The fact that students could be released from the classroom was unpersuasive. The Court, instead, was persuaded by the argument that if students were constrained to leave the classroom to stand in the halls during the observance, their peers might regard them as "odd balls" or perceive them as being subject to punishment.⁵⁰ The Court concluded that the effect of these social pressures was subtle coercion to conform to the officially "approved" religion.⁵¹

ii. accommodation to religion

In contrast, while the government may not constitutionally sponsor religious activities, it may *accommodate* student religious activities conducted by or for students during the school day. In another "released time" case, *Zorach v. Clauson*,⁵² the Court upheld a voluntary state program which permitted New York City public school teachers to release students during the school day to report to nearby religious centers for religious instruction or devotional exercises, and adjusted the school schedule to accommodate those students.⁵³ The sponsoring churches sent weekly reports to school authorities of children who had not reported for instruction.⁵⁴

The majority distinguished the *Zorach* program from the *McColum* program on several grounds. First, the *Zorach* program took place off school property, whereas the *McColum* program turned public school classrooms over to religion instructors as part of the formal classroom curriculum. Under this circumstance, the instructors may have appeared to students as endorsed by the state.⁵⁵ Second, the *Zorach* program required no expenditure of public funds, while the *Mc-*

48. 374 U.S. at 223.

49. *Id.*

50. *Id.* at 224-25.

51. *Id.* at 221. The courts assume that "coercion" plays some role in establishment clause analysis dealing with ostensible endorsement. Traditionally, however, coercion is the gist of a free exercise violation. See *infra* note 208.

52. 343 U.S. 306 (1952).

53. *Id.* at 314.

54. *Id.* at 308. A student was released to attend religious instruction on written request of his parents. Those not released stayed in school.

55. *Id.* at 309.

Collum program involved state purchase of Bibles and use of public school teachers' time.⁵⁶ Third, there was no evidence in *Zorach* that compulsory attendance laws were invoked to assure attendance, directly or by subtle coercion, at the religious centers since "[n]o one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools."⁵⁷ By contrast, the religious program in *McCollum* was brought to the student, and the student needed to take affirmative steps to absent himself from the room to avoid the program.⁵⁸

The *Zorach* Court concluded that, while the principle of separation between church and state must remain absolute and unabridged, the state may accommodate the religious needs of its citizens by adjusting school schedules and releasing religious students.⁵⁹ The Court explained that the "neutrality" principle embodied in the establishment clause may require accommodation in some circumstances:

We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.⁶⁰

From the foregoing, the Supreme Court appears to take the position that government has affirmatively sponsored or ostensibly endorsed religion when one or more of the following elements are present:⁶¹ (1) the religious activity is initiated or conducted by govern-

56. *Id.*

57. *Id.* at 311. The Court rejected the argument that

the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. The record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented.

Id. (citations omitted).

58. *Id.* at 315.

59. *Id.* at 312, 315.

60. *Id.* at 313-14.

61. The United States Supreme Court has not expressly enumerated these criteria. Nor

ment; (2) it is curricular in nature, i.e., it is either prescribed as part of formal classroom instruction or inextricably blended with it; (3) it occurs under circumstances which foster the appearance that government stands behind or endorses the religious content; or (4) those students not desiring to participate must take affirmative steps to remove themselves from the religious activity.⁶²

iii. religious meetings cases compared

A number of courts have concluded that state action permitting religious student groups the use of classrooms during noninstructional hours for voluntary religious meetings amounts to sponsorship of religion, in violation of the *primary effect* requirement of the *Lemon* test. In *Johnson v. Huntington Beach Union High School District*,⁶³ a group of students at a public high school sought to form a voluntary student Bible study club and applied for the official recognition and approval required to utilize classroom space during school hours.⁶⁴ Although the school had authority to recognize student clubs, long standing district policy denied recognition to religious clubs.⁶⁵ The students' application to form the club was therefore denied.⁶⁶

The California Court of Appeal, applying the tripartite *Lemon* test, prohibited the district from recognizing the Bible study club on the ground, *inter alia*, that the primary effect of recognition would be advancement of religion.⁶⁷ The majority declared that what "most offends establishment clause principles" was that "the consequence of permitting the club to operate on campus as a recognized student organization is to place school support and sponsorship behind the reli-

has it used the terms "affirmative sponsorship" or "ostensible endorsement"; but the same are reasonably deducible from the Court's decisions.

62. The first three criteria were formulated by the dissent in *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 21-22, 137 Cal. Rptr. 43, 55-56 (McDaniel, J., dissenting), *cert. denied*, 434 U.S. 877 (1977).

63. 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977) (certiorari denied on ground that petition was not from a final judgment).

64. *Id.* at 6, 137 Cal. Rptr. at 45. Status as a student club also entitled the group to publicize its activities throughout the campus and in the school student newspaper. *Id.* at 6 n.3, 137 Cal. Rptr. at 45 n.3.

65. *Id.* at 7, 137 Cal. Rptr. at 46. The district had briefly suspended its policy of prohibiting religious groups from meeting, but reinstated its long standing policy based on advice from county counsel. Counsel's opinion was subsequently supported by an official opinion of the office of the California Attorney General. *See* 59 OP. CAL. ATT'Y GEN. 214 (1976), noted in *Huntington Beach*, 68 Cal. App. 3d at 7-8, 137 Cal. Rptr. at 46.

66. 68 Cal. App. 3d at 8, 137 Cal. Rptr. at 46.

67. *Id.* at 12-13, 137 Cal. Rptr. at 49-50.

gious objectives of the club.”⁶⁸ It would have the fatal primary effect of “implicat[ing] school authority and prestige behind the dissemination of religious dogma.”⁶⁹ The court emphasized that high school students, whose presence is compelled by law, may be “vulnerable to the pressure of an officially recognized student religious organization.”⁷⁰

Similarly, in *Brandon v. Board of Education*,⁷¹ the Second Circuit upheld a school board’s action denying to a group of high school students permission to use an unoccupied school classroom to conduct voluntary prayer meetings prior to the commencement of school each day.⁷² Applying the *Lemon* test, the court held that the use of public school property would have the fatal primary effect of advancing religion by the appearance of ostensible state support for the dissemination of religious doctrine.⁷³ The *Brandon* court relied upon *McCullum*⁷⁴ and *Zorach*,⁷⁵ noting the distinguishing feature of the permitted religious instruction in *Zorach* was that it was not held in the classroom, whereas the condemned religious instruction in *McCullum* was.⁷⁶ The court also compared the case to *Schempp*⁷⁷ and *Engel*,⁷⁸ both of which involved teacher supervised prayer and Bible recitation.⁷⁹

68. *Id.* at 13, 137 Cal. Rptr. at 50.

69. *Id.* at 16, 137 Cal. Rptr. at 51.

70. *Id.* at 15, 137 Cal. Rptr. at 51. A similar case was *Trietley v. Board of Educ.*, 65 A.D.2d 1, 409 N.Y.S. 912 (1978). There high school students, through their parents, brought suit seeking to overturn a denial by a Buffalo, New York board of education of a request by six high school students and a clergyman to form Bible study clubs in two Buffalo high schools. *Id.* at 3-4, 409 N.Y.S. at 914. The court upheld the board action, holding that “although there may be incidental secular benefits, the primary effect of the bible clubs is the advancement of the religious philosophy contained in the bible.” *Id.* at 7, 409 N.Y.S. at 916. The court offered no analysis of the issues.

71. 635 F.2d 971 (2d Cir. 1980).

72. *Id.* at 973.

73. *Id.* at 978-79. The court explained:

Our nation’s elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit. An adolescent may perceive “voluntary” school prayer in a different light if he were to see the captain of the school’s football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the “captive audience” setting of a school.

635 F.2d at 978 (citations omitted).

74. 333 U.S. 203 (1948); see *supra* notes 36-40 and accompanying text.

75. 343 U.S. 306 (1952); see *supra* notes 52-60 and accompanying text.

76. 635 F.2d at 978.

77. 374 U.S. 203 (1963); see *supra* notes 46-51 and accompanying text.

78. 370 U.S. 421 (1962); see *supra* notes 41-45 and accompanying text.

79. The *Brandon* court observed that the “degree of official support of religious activities” was greater in the *Schempp* and *Engel* cases. 635 F.2d at 979. In *Brandon*, there was

In *Dittman v. Western Washington University*,⁸⁰ a federal district court upheld a state university policy restricting voluntary, student initiated religious meetings in campus buildings to no more than twice per academic quarter and requiring that fair rental value be paid for each use.⁸¹ Nonreligious student groups were not subject to similar restrictions.⁸² The court held that that regular use of university facilities would constitute an advancement of religion and have the "unavoidable effect of placing the imprimatur of government upon the religious activities being conducted in those facilities."⁸³

Many of the same arguments accepted by these courts were rejected by the Eighth Circuit in *Chess v. Widmar*.⁸⁴ In *Chess*, the court reviewed a university policy permitting a recognized student religious group to conduct weekly Saturday night meetings in an unused lecture hall for informal sharing, prayer, Bible study and hymn singing, holding that this policy did not have the primary effect of advancing religion.⁸⁵ The court stated:

Rather, it would have the primary effect of advancing the university's admittedly secular purpose—to develop students' "social and cultural awareness as well as [their] intellectual curiosity." It would simply permit students to put their religious ideals and practices in competition with the ideas and practices of other groups, religious or secular. It would no more commit the University, its administration or its faculty to religious goals than they are now committed to the goals of the Students For a Democratic Society, the Young Socialists Alliance, the Young Democrats or the Women's Union.⁸⁶

The court also noted that university students "rely more upon the campus as their total community," and can thus expect greater accommodation to their religious needs.⁸⁷

In evaluating the divergent conclusions reached by these courts

no evidence recited by the court that students who did not desire to participate were exposed to the meetings, which were held before the formal "homeroom" period at 7:50 a.m. in an unoccupied classroom and attended solely by students desiring to participate. *Id.*

80. No. 79-1189 (W.D. Wash. Feb. 28, 1980) (memorandum opinion), *vacated as moot*, No. 80-3120 (9th Cir. Mar. 30, 1982).

81. *Id.* at 11.

82. *Id.* at 1.

83. *Id.* at 5 (citations omitted).

84. 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom.* *Widmar v. Vincent*, 102 S. Ct. 269 (1981); see *infra* notes 281-321 and accompanying text.

85. 635 F.2d at 1317.

86. *Id.*

87. *Id.* at 1320.

some guidance can be found in the Supreme Court's decisions dealing with sponsorship or ostensible endorsement.⁸⁸ The first and apparently chief element of sponsorship, initiation (conduct of religious activity by school authorities, or a union of effort in promoting religion), seems to be missing in the religious meetings context.⁸⁹

The second factor relied upon by the Supreme Court, that the religious activity be prescribed as part of the normal daily curriculum, is most notably lacking in this context. In each case, the proposed prayer meetings or Bible studies were unmistakably separated from the school curriculum because they were to be held before,⁹⁰ after, or between classes⁹¹ in separate rooms. The *Huntington Beach* court nevertheless declared that even as an "implicitly extracurricular" activity, the proposed Bible study would constitute sponsorship.⁹² That this was an extension of the Supreme Court's position was not noted by that court.

An additional element or factor emphasized by the Supreme Court, which is missing in the religious meetings context, is that non-participating students need take no affirmative steps to avoid the religious activity. The Court's concern, manifest in the high school setting, is twofold: students may be a "captive audience," as a result of compulsory attendance laws, and vulnerable to social pressure. The problem is best exemplified by *McCollum*, where reluctant but captive students would have to dismiss themselves from ongoing religious activity, thereby risking the ridicule accorded a "minority."⁹³ By contrast, in the religious meetings context, a willing student must

88. See *supra* text accompanying notes 61-62.

89. In each case the proposed club or meeting was independently conceived, organized and conducted by students without the assistance of school employees. It is questionable whether in the case of recognition of a religious group, existence of a faculty "sponsor" or access to campus bulletin boards or to a student newspaper amounts to the active union of efforts condemned in *McCollum*. See *supra* text accompanying notes 36-40. The partnership between religious authorities and school officials in *McCollum* could be characterized as active, specifically directed to religious groups only, and unequivocally referable to promotion of religion. In the religious meetings context, on the other hand, the act of allowing access to campus communications media and the furnishing of a "sponsor, since the same are available to all recognized groups," can be characterized as passive, nonspecific and neutral. They have no unique applicability to religion. In addition, their effectiveness is potential, not actual, being dependent upon students to make use of them.

90. *E.g.*, *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980). Although the meetings occurred prior to the commencement of classes, they were considered part of the school day. *Id.* at 979.

91. *E.g.*, *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977) (certiorari denied on the ground that state court judgment was not final).

92. *Id.* at 13, 137 Cal. Rptr. at 50.

93. See *supra* notes 36-40 and accompanying text.

affirmatively discover the existence of the religious group, its time and place of meeting, and actively seek it out. In short, the student "comes to religion"; religion does not "come to the student."⁹⁴

A more realistic basis for finding ostensible endorsement, as well as coercion, involves the Supreme Court's fourth element: that the religious activity take place under circumstances which foster the appearance of official endorsement. The circumstance that religious activity occurs on public school property is occasionally regarded as determinative. For example, the *Brandon*, *Dittman*, and *Huntington Beach* courts noted that the forbidden released time program of *McCollum v. Board of Education*⁹⁵ took place in public school classrooms, while the approved program in *Zorach v. Clauson*⁹⁶ took place off campus, whence they concluded that the chief operative factor in assessing whether circumstances suggest ostensible endorsement is whether the activity is held on school property.⁹⁷

However, the situs of the activity factor was treated by the Supreme Court as merely one factor to be considered. Other opinions by individual Justices suggest that the Court's reference to "classrooms," as the situs of the condemned *McCollum* program, was meant in the "curricular" rather than the "geographic" sense. Justice Brennan rejected the geographic notion, explaining that "the deeper difference was that the *McCollum* prayer placed the religious instructors in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did

94. See *supra* note 57 and accompanying text. Several courts have suggested that compulsory attendance laws constitute a source of coercion and that this fact distinguishes high school students from college students with regard to vulnerability to coercion. *E.g.*, *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980) (by implication), *aff'd sub nom. Widmar v. Vincent*, 102 S. Ct. 269 (1981); *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980) (by implication). However, it is unclear what logical relevance the fact that students are required to attend high school has to the degree of coercion; compulsory attendance laws render students a captive audience, but not with respect to those activities to which they are not exposed.

Outside the establishment clause, courts have held that high school students are not a captive audience with respect to a faculty supervised student newspaper, containing objectionable material, where students must affirmatively seek out and pick up the newspaper. See *infra* note 104 and accompanying text. By analogy, where religious meetings are sufficiently discreet and a student must affirmatively seek them out, the "captive audience" source of coercion appears an untenable argument, even in the high school setting. A different situation might be present if the meetings are held in an area frequently traveled by all students, such as a "commons" area or stadium.

95. See *supra* notes 36-40 and accompanying text.

96. See *supra* notes 52-60 and accompanying text.

97. See *supra* note 35 and accompanying text.

not."⁹⁸

To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.⁹⁹

Justice Brennan's interpretation in *Schempp* is reinforced by the views of four other Justices, Frankfurter, Jackson, Rutledge, and Burton, who joined in a concurring opinion in *McCollum*. These Justices explained that "the whole school atmosphere and school planning is presumably put behind religious instruction . . . precisely in order to secure for the religious instruction such momentum and planning."¹⁰⁰

It remains to be considered whether these courts, in extending the Supreme Court's decisions, correctly concluded that a grant of permission to hold a religious activity in these circumstances constitutes affirmative sponsorship or ostensible endorsement. A number of cases have recognized a distinction between college and high school students based on the latter's presumed greater impressionability.¹⁰¹ It might be argued that high school students are led to believe that organized activities occur on campus only by grace of official "approval."¹⁰²

On balance, fears of coercion to religion, born of a perception of official endorsement and based on a mere grant of permission, may be overstated. In other public school contexts outside of the establishment clause, courts have held that not every activity which public schools permit implies endorsement,¹⁰³ even in the high school setting.¹⁰⁴

98. *Abington School Dist. v. Schempp*, 374 U.S. 203, 262 (1963) (Brennan, J., concurring).

99. *Id.* at 263.

100. 333 U.S. at 230 (Frankfurter, J., concurring).

101. *E.g.*, *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom. Widmar v. Vincent*, 102 S. Ct. 269 (1981); *Brandon v. Board of Educ.*, 635 F.2d at 978; *Roemer v. Board of Pub. Works*, 426 U.S. 736, 750 (1976) ("College students are less susceptible to religious indoctrination; college courses tend to entail an internal discipline that inherently limits the opportunities for sectarian influence; and a high degree of academic freedom tends to prevail at the college level."); *see infra* note 298.

102. It seems safe to assume that high school students are aware that because of their relative immaturity, they and their activities are significantly controlled. A stronger argument could therefore be made that formal recognition as a school club goes too far.

103. The Fifth Circuit has held that a naked grant of permission does not imply endorsement of a given activity. In *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir.), *rel'g en banc*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974), officials of a public university sought to ban publication of short stories containing "four letter words" in a student publication on the theory that publication constituted "endorsement" of the articles by the uni-

Thus, a majority of courts which have ruled on the subject have taken the position that a student staffed school newspaper is not so assimilated into school curriculum or identifiable with the school as to justify curtailing expression of arguably objectionable material on the theory that publication would constitute endorsement by the school.¹⁰⁵

Most significantly, the religious meetings are typically only one of many special interest groups or activities available to a student. The multiplicity of alternatives would appear in most situations to dilute any inference that the school endorses a particular group. For example, the District of Columbia Circuit in *O'Hair v. Andrus*¹⁰⁶ held that where a public forum is made available to all groups, including religious groups, no "implied message" of government support is telegraphed; rather, the "message" is that government approves the "principle of freedom of demonstration, for all groups, for all religions,

versity. 476 F.2d at 575. The Fifth Circuit dismissed the argument and denied the requested relief, stating that "[t]he state is not necessarily the unrestrained master of what it creates and fosters." *Id.*

104. The rule of *Bazaar*, see *supra* note 103, was followed in the high school context in *Gambino v. Fairfax County School Bd.*, 429 F. Supp. 731 (E.D. Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977). There a school board asserted that allowing the student newspaper to print an article containing information on contraceptives would effectively impose upon the student body the views it contained, under the imprimatur of school authority. *Id.* at 735. The board also argued that the rule of *Bazaar* is limited to the university context, in that compulsory attendance laws rendered the high school audience a captive one. The district court rejected the board's argument and stated:

The defendants have asserted . . . that the subscription tie-in with the yearbook, the distribution in home rooms, the official status of the newspaper, and peer pressure, coupled with mandatory attendance all combine to compel the student body's exposure to the contents of the [student newspaper]. The Court is not persuaded that these circumstances establish [a] captive audience If anything, the students . . . are less captive because they must act affirmatively to pick up the newspaper.

Id. at 736; *accord* *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969) (high school).

105. See *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977); *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975); *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974).

Similarly, but in a different context, the Supreme Court further weakened the ostensible endorsement argument. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court upheld a state constitutional provision which permitted individuals to exercise free speech and petition rights on the property of a privately owned shopping center. The Court rejected the owner's argument that where the law requires permitting the use of the property as a public forum, an implication would arise that the owner was endorsing the views of such individuals. 447 U.S. at 87. The Court explained that the views expressed by the public in passing out pamphlets "will not likely be identified with those of the owner." *Id.* In addition, the owner "can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law." *Id.*

106. 613 F.2d 931 (D.C. Cir. 1979).

even for those opposing religion."¹⁰⁷

Other courts have rejected emphatically the notion that high school students are so easily coerced or influenced as to warrant curtailing exposure to a diversity of viewpoints.¹⁰⁸ Nor are such assumptions supported by the empirical findings of modern social psychological research.¹⁰⁹

b. direct financial aid

A second category of governmental action having the impermissible primary effect of advancing religion, in violation of the *Lemon* test,¹¹⁰ is direct financial aid to religion.¹¹¹ The Supreme Court developed this category in the context of reviewing state subsidies to sectarian schools and colleges¹¹² and has never considered the religious meetings context.

Much of the controversy regarding financial benefits to religion has involved judicial line drawing. It is clear that a direct subsidy to a religious group, such as a church school, is prohibited by the establishment clause.¹¹³ If the prohibition against all financial benefits to religion were pressed to its logical extreme, however, government could not constitutionally extend to religious groups the benefits of any ordinary general welfare legislation because all governmental action has

107. *Id.* at 936; see *infra* text accompanying notes 294-96.

108. In *Wilson v. Chancellor*, 418 F. Supp. 1358 (D. Or. 1976), a federal district court overturned a school ban on political speeches. The court declared that the student audience would not be converted overnight to communist ideology because "today's high school students are surprisingly sophisticated, intelligent, and discerning. They are far from easy prey for even the most forcefully expressed, cogent, and persuasive words." *Id.* at 1367-68.

109. The model of students as receptacles for propaganda, sometimes termed the "bullet theory" of communications, assumes a passive audience. This model is today discredited. Communication theory has moved in the last forty years "from the concept of a passive, helpless audience to that of an obstinate, self-reliant *active* one," W. SCHRAMM, *MEN, MESSAGES, AND MEDIA: A LOOK AT HUMAN COMMUNICATION* 246 (1973) (emphasis in original), which tests messages against the norms of their personal reference group. See generally E. KATZ & P. LAZARSFELD, *PERSONAL INFLUENCE* (1964).

110. See *supra* text accompanying note 30.

111. See *infra* note 113.

112. See, e.g., *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (annual grants to private colleges); *Meek v. Pittenger*, 421 U.S. 349 (1975) (furnishing free auxiliary services, such as counseling and testing, to private elementary and secondary schools); *Sloan v. Lemon*, 413 U.S. 825 (1973) (tuition grants to parents of private schoolchildren).

113. *Committee For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). In *Nyquist*, the Court invalidated a state program insofar as it provided direct money grants to qualifying private schools in low income areas for repair and maintenance of their facilities, purported to grant tuition reimbursement to parents of private schoolchildren, and provided for tax relief to parents of such children. The Court found the aid "direct" where the class of beneficiaries was composed almost entirely of Roman Catholic schools. *Id.* at 774.

unavoidable incidental benefits which ripple throughout society.¹¹⁴

The Supreme Court drew a line in *Everson v. Board of Education*.¹¹⁵ A state program reimbursed parents of both public and sectarian school children for bus fares expended in transporting their children to school.¹¹⁶ The objection was raised that part of the funds went to transport children to Roman Catholic schools, thus constituting an establishment of religion.¹¹⁷ The Court admitted that the benefit thereby conferred helped children get to sectarian schools, in the sense that parents might not otherwise send their children to such schools without free transportation.¹¹⁸ But the same possibility existed that parents might not send their children to church schools to which the state had denied such basic services as police and fire protection, connections for sewage disposal, and public highways and sidewalks.¹¹⁹ The Court further stated:

Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.¹²⁰

Everson thus came to stand for the proposition that *indirect* economic benefits, *incidental* to a general program providing secular and neutral services to all students, do not have a primary religious effect.¹²¹ Later cases added the requirement that the nonsecular economic effect also be "remote."¹²² These later cases applied the rule to sustain governmental action providing neutral, incidental, indirect, and

114. The Supreme Court has never adopted the "strict neutrality theory," according to which government could not classify in terms of religion either to confer a benefit or impose a burden. See P. KURLAND, *RELIGION AND THE LAW* (1962). One commentator has observed that the "no-aid" theory in its extreme form would require children "attending churches preaching personal study of the Bible [to] be barred from the public schools so as not to relieve these churches of the heavy financial burden of teaching their members to read." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: The Nonestablishment Principle* (Part II), 81 HARV. L. REV. 513, 568 (1968).

115. 330 U.S. 1 (1947).

116. *Id.* at 3.

117. *Id.* at 3-5.

118. *Id.* at 17.

119. *Id.*

120. *Id.* at 18.

121. See *infra* note 299 and accompanying text.

122. See Committee For Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783-85 n. 39 (1973).

remote—albeit substantial—economic benefits to religion. These benefits included the free loaning of textbooks to all private school children (including religious school children),¹²³ federal grants to institutions for higher education (including church-related colleges),¹²⁴ granting of property tax exemptions to church property used solely for religious worship (where the exemption was granted to a broad class of property owned by nonprofit, quasi-public corporations),¹²⁵ and providing to private colleges (including church colleges) financing at bargain interest rates.¹²⁶

The use of tax supported school buildings by religious student groups without charge, or at a rent below prevailing fair rental value, arguably constitutes a financial benefit to religion. The authorities are split regarding whether the benefit is properly to be classified as “direct” or “indirect.” The court in *Johnson v. Huntington Beach Union High School District*,¹²⁷ as an independent ground for condemning under the establishment clause the proposed student Bible study club, declared that if the club were permitted to meet on the school campus, “state financial support would flow directly to the club.”¹²⁸ The prohibited financial benefits identified by the court were rent-free use of classroom space, free heat and light, a paid faculty sponsor, and school district expense in meeting its statutorily imposed obligation to audit club finances.¹²⁹ For authority, the court cited *McCollum v. Board of Education*¹³⁰ and *Zorach v. Clauson*¹³¹ and noted that the *Zorach* Court had distinguished *McCollum* on the ground, *inter alia*, that the condemned *McCollum* program involved free use of classrooms.¹³² The court in *Brandon v. Board of Education*¹³³ never discussed the

123. *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

124. *Tilton v. Richardson*, 403 U.S. 672 (1971) (plurality opinion). The Court upheld that portion of the act which conditioned receipt of funds for construction of buildings upon covenants to restrict the use of the buildings for secular educational purposes, but invalidated that portion of the act which would, at the expiration of the twenty year covenants, amount to an outright gift to the church related colleges of buildings for unrestricted religious use. *Id.* at 683-84.

125. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

126. *Hunt v. McNair*, 413 U.S. 734 (1973).

127. 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977); *see supra* note 63.

128. 68 Cal. App. 3d at 12, 137 Cal. Rptr. at 49.

129. *Id.*

130. 333 U.S. 203 (1948); *see supra* notes 36-40 and accompanying text.

131. 343 U.S. 306 (1952); *see supra* notes 52-60 and accompanying text.

132. 68 Cal. App. 3d at 12, 137 Cal. Rptr. at 49.

133. 635 F.2d 971 (2d Cir. 1980).

financial benefit issue. In *Dittman v. Western Washington University*,¹³⁴ a different type of financial benefit was condemned: as a recognized university student group, religious students would be entitled to direct payments of public funds.¹³⁵

On the other hand, the Eighth Circuit in *Chess v. Widmar*¹³⁶ analyzed the economic benefits to a recognized university religious student group resulting from the free use of an unused lecture hall for weekly Saturday night prayer, fellowship, and religious study; the court held the economic benefits to be indirect and incidental.¹³⁷ The primary secular effect, to which the nonsecular economic benefits were said to be incidental, was that of developing students' social and cultural awareness and intellectual curiosity through formation and conduct of extracurricular student clubs and interest groups.¹³⁸ The court observed that religious groups were merely part of a broad class to which the privilege of using campus facilities had been extended, *viz.*, all recognized student groups.¹³⁹

The question here is whether free rent and utilities are a direct and immediate economic benefit to religion, or an indirect, remote, and incidental benefit. In deciding questions of this kind the Supreme Court has looked to several factors. First, the Court implicitly has asked whether the nonsecular effect is *separable* from the religious. Non-separability is generally established by showing that the particular form of aid is neutral in character, having no unique adaptability to religious purposes nor susceptibility to diversion to such purposes.¹⁴⁰ Thus, the Court has upheld the furnishing of such neutral aid as buses,¹⁴¹ secular books,¹⁴² general governmental services such as police and fire protection and water services,¹⁴³ and certain health and remedial education services.¹⁴⁴ Viewed strictly from the economic benefit perspective, "buildings" are not easily distinguished from buses or books. Neither

134. No. 79-1189 (W.D. Wash. Feb. 28, 1980) (memorandum opinion), *vacated as moot*, No. 80-3120 (9th Cir. Mar. 30, 1982); *see supra* notes 80-84 and accompanying text.

135. No. 79-1189 at 1-2.

136. 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom.* *Widmar v. Vincent*, 102 S. Ct. 269 (1981); *see supra* notes 84-86 and accompanying text.

137. 635 F.2d at 1318-19.

138. *Id.*

139. *Id.*; *see infra* note 296.

140. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-9, at 840 (1978) [hereinafter cited as TRIBE].

141. *See supra* note 115.

142. *See supra* note 123.

143. *See supra* note 115.

144. *See Wolman v. Walter*, 433 U.S. 229 (1977). But aid to a "pervasively sectarian" school poses the risk of having a direct and immediate effect of advancing religion; the state

buildings nor free utilities have any unique adaptability to religious purposes. For example, the secular effect of heat and light is to maintain a continuity of basic school functions for anyone using the classroom—religious and nonreligious alike.¹⁴⁵ It can therefore be argued that such incidental aid to a student religious group is inseparable from the secular effect of promoting student development.

Second, the Supreme Court has found economic benefits incidental where the class of beneficiaries is sufficiently broad.¹⁴⁶ It thus appears that the *Chess* court, in upholding the religious meetings there involved, correctly relied on the fact that the student religious group was one of many student interest groups permitted to use university facilities as part of a broad policy of promoting and encouraging extra-curricular student interest groups.¹⁴⁷ The *Huntington Beach*, *Dittman*, and *Brandon* courts might be criticized for ignoring the fact that religious groups are also *student* groups, and that it is in their status as students that the groups receive free rent and utilities. If, on the other hand, religious groups were singled out for some peculiar advantage in space assignment, or if a school reimbursed only a religious student group for out of pocket expenses, such "aid" would more properly be characterized as "direct" and "immediate."¹⁴⁸

Finally, the Supreme Court has measured the nature and extent of

would in fact be paying for a sectarian education. See generally *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

145. The argument that permitting religious meetings on public school property constitutes a direct financial benefit to religion might be made as follows: public schools are tax supported; religious meetings occur in tax supported buildings; therefore, the building is a contribution of value from the public treasury in aid of religious teaching and a vehicle for such teaching. There are several objections to this argument. First, a building is separable from any religious effect because it has no religious significance. While a building might be said to be a vehicle for religious activity, in the sense that it makes the very activity possible, a bus is quite literally the "vehicle" which makes possible a religious education at a sectarian school by transporting children to school—yet, the bus is permissible.

In addition, this argument seems to miss the point that where the financial benefit is otherwise incidental and indirect, any remaining benefit does not have as its object or effect the rendering of assistance to religious teaching, but merely the accommodation of the rights of religious students to free exercise, association and access to a public forum. It is significant that religious groups enjoy the right to equal access and use of tax supported public fora such as streets, parks, and the National Mall, see *infra* note 235 and accompanying text; *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (upholding right of Roman Catholic Archdiocese publicly to celebrate Mass conducted by Pope John Paul II on National Mall in Washington), but no establishment clause problem is thought to be present in these cases.

146. *TRIBE*, *supra* note 140, at 840; cf. *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (bus transportation furnished to all schoolchildren, of whom religious children were only a part).

147. See *supra* notes 133-34 and accompanying text; see also *infra* note 299 and accompanying text.

148. See *supra* note 113 and accompanying text.

the "aid" to religion.¹⁴⁹ Condemned aid has been tangible, separable and quantifiable, such as cash payments¹⁵⁰ and payments of sectarian school teachers' salaries.¹⁵¹ Aid of this sort is a cost to the school which it would not otherwise bear and is a benefit to religion which can be instantly translated into religious propagation. The line between state action and evangelism in such a case is straight and direct.

In marked contrast is the religious meetings context, where students use *existing* facilities and benefit from heat and light which would represent a constant cost to the school in any event, thereby involving no separate state expenditure. The student group realizes a financial benefit solely in the form of the savings of funds it might otherwise have spent, funds which are freed to be devoted to religious ends. But the Supreme Court has declined to characterize such a benefit as "aid," stating that "the Court has never accepted the recurrent argument that all aid is forbidden because aid on one aspect of an institution frees it to spend its resources on religious ends"¹⁵²

c. primary effect revisited: the inhibition of religion

The Supreme Court's tripartite *Lemon* test,¹⁵³ designed to ensure neutrality, admits of no inhibition of religion to the same extent that it admits of no advancement. One of the few cases to find a violation of the establishment clause based on a primary effect that inhibits religion is *Chess v. Widmar*,¹⁵⁴ in which the Eighth Circuit held:

In contrast with a neutral policy [the University's] current regulation [prohibiting religious meetings in campus facilities] has the primary effect of inhibiting religion, an effect which violates the Establishment Clause just as does governmental advancement of religion The University's policy singles out and stigmatizes certain religious activity and, in consequence, discredits religious groups.¹⁵⁵

The evidence in *Chess* showed that the prohibition against religious meetings on campus imposed severe disabilities on the student

149. "The problem, like many problems in constitutional law, is one of degree." *Meek v. Pittenger*, 421 U.S. 349, 359 (1975) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

150. *Levitt v. Committee For Pub. Educ.*, 413 U.S. 472 (1973) (holding invalid lump sum per pupil payment to all private schools to cover cost of services mandated by state law).

151. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

152. *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

153. See *supra* text accompanying note 30.

154. 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom.* *Widmar v. Vincent*, 102 S. Ct. 269 (1981); see *infra* notes 281-321 and accompanying text.

155. 635 F.2d at 1317.

group which had sought to hold weekly Saturday night meetings in an unused lecture hall. As a consequence of being forced to meet off campus, the group suffered a loss of visibility and identity as a campus organization.¹⁵⁶ *Chess* thus implicitly stands for the proposition that where the elements of an establishment clause violation are not otherwise present, imposing disabilities on religious groups amounts to a prohibited inhibition of religion.

The problem is that the terms "advancement" and "inhibition" are legal conclusions, not self-applying tests. The courts that ruled that permitting religious meetings advanced religion believed that it was necessary for the state, in effect, to inhibit religion in order to avoid advancing it. The important unanswered question is whether "advancement" and "inhibition" are merely flip sides of the same coin, i.e., whether every disability imposed on a religious activity unnecessary to avoid an advancement is an inhibition, or whether, instead, a court should weigh the degree of inhibition imposed against the degree of advancement to be avoided.

It is suggested that the Supreme Court has intended the latter analysis in its proscription against either inhibition or advancement of religion. This would seem to follow from the principle that a judicial opinion, like a statute, should be given an interpretation which will render its words reasonable; any other interpretation here would render the test a mere tautology. In addition, the Court has indicated that where an advancement of religion is merely arguable, theoretical or speculative, but the inhibition is severe and palpable, it is the inhibition which controls. In *McDaniel v. Paty*,¹⁵⁷ a plurality of the Court struck down a state provision barring ministers from political office.¹⁵⁸ The justification asserted by the state was prevention of an establishment clause violation, *viz.*, avoiding injection of sectarian concerns into the lawmaking process and fomentation of religious strife.¹⁵⁹ While no member of the Court accepted the argument, Justices Brennan and Marshall stated in a separate opinion that they would have based the decision, in part, on the establishment clause. According to these Justices, exclusion of ministers in order to avoid an establishment clause violation

itself raises the question whether the exclusion violates the Establishment Clause. As construed, the exclusion manifests

156. *Id.* at 1317 & n.9. A member of the religious group stated in an affidavit filed with the district court: "Having to explain that we have to meet off campus tends to make students think that there is something 'wrong' with us and that there is something wrong with religion since it has been banished from the campus." *Id.*

157. 435 U.S. 618 (1978) (plurality opinion).

158. *Id.* at 629.

159. *Id.* at 628.

patent hostility toward, not neutrality respecting, religion; forces or influences a minister or priest to abandon his ministry as the price of public office; and, in sum, has a primary effect which inhibits religion.¹⁶⁰

It might thus be argued that any "advancement" flowing from the passive act of permitting private, voluntary religious meetings is theoretical in many cases—particularly in university settings—and is outweighed by both the inhibition of religion flowing from exclusion from the campus and the concomitant curtailment of the arguably protected first amendment rights of speech, expression and association.¹⁶¹

3. Entanglement with religion

The third requirement of the *Lemon* test provides that governmental action must not foster an "excessive governmental entanglement with religion."¹⁶² The no-entanglement requirement has been used both as a basis for prohibiting certain aid to religion¹⁶³ and as a justification for permitting certain benefits which might otherwise constitute an impermissible advancement of religion.¹⁶⁴

Entanglement may be of two types, administrative or political. The first has arisen where government aid to certain schools, particularly "pervasively sectarian" elementary or secondary schools, is peculiarly susceptible to diversion to religious uses. To ensure that no aid is put to religious purposes, government would need to involve itself in an intrusive and day-to-day administrative program of monitoring school affairs; therefore, aid itself is prohibited.¹⁶⁵ The second type, political entanglement, arises where governmental action carries a risk of divisive political conflict along religious lines; therefore, the action itself is prohibited.¹⁶⁶ The no-political-entanglement requirement has served chiefly to invalidate continuing grant programs. Such programs assure

160. *Id.* at 636 (footnote omitted).

161. See *infra* text accompanying notes 213-30.

162. See *supra* text accompanying note 30.

163. See, e.g., *Levitt v. Committee For Pub. Educ.*, 413 U.S. 472, 481-82 (1973).

164. See, e.g., *Hunt v. McNair*, 413 U.S. 734, 741-46 (1973).

165. In its prohibitive form the requirement has been applied almost exclusively in the context of aid to private schools, invalidating aid to those institutions which are so "pervasively sectarian" that it would be necessary for the state to monitor the school to ensure that public funds are not spent on religious propagation. See *Meek v. Pittenger*, 421 U.S. 349 (1975); *Hunt v. McNair*, 413 U.S. 734 (1973).

166. *Lemon v. Kurtzman*, 403 U.S. 602, 622-24 (1971). The "political divisiveness" arm of the no-entanglement principle was first introduced, apparently without conscious inten-

periodic reconsideration at renewal time and thereby present the prospect for repeated political confrontation among members of the public.¹⁶⁷

Courts have used both entanglement principles to invalidate religious meetings conducted on the public campus. The court in *Johnson v. Huntington Beach Union High School District*¹⁶⁸ found excessive administrative entanglement in provisions of state law requiring a faculty sponsor to attend all club functions and the school to audit clubs' financial accounts and review membership procedures to ensure that they were not secret or discriminatory.¹⁶⁹ In addition, the court found a potential for divisiveness by hypothesizing the possibility that students representing less orthodox religions might be unable to organize a club because of insufficient student support or inability to procure a faculty sponsor, together with the possibility of competition among outside sects who may vie for permission to operate on campus.¹⁷⁰

Similarly, the court in *Brandon v. Board of Education*¹⁷¹ found a risk of excessive administrative entanglement from continuing surveillance of proposed prayer meetings, which the court assumed would be required to guarantee that participation would remain strictly voluntary.¹⁷² The court also assumed that official supervision would be required to ensure the smooth functioning of the school's secular schedule and the maintenance of the school's safety and order.¹⁷³

The basis for the notion that monitoring a religious student group for the neutral purpose of assuring school security and personal safety poses a risk of excessive entanglement is not articulated by these courts and appears to lack authority. The extent of state involvement with religion in this context appears to fall within the ambit of permissible accommodation outlined by the *Zorach* Court.¹⁷⁴ There, the school district maintained responsibility for religious students while they attended off-campus religious meetings and while church officials took attendance and sent school officials regular reports.¹⁷⁵ Church and school officials maintained a close liaison for the purpose of coordinat-

tion to carve out a new doctrine, by Justice Harlan in *Board of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring).

167. 403 U.S. at 622-24.

168. 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977).

169. *Id.* at 13-14, 137 Cal. Rptr. at 50.

170. *Id.*

171. 635 F.2d 971 (2d Cir. 1980).

172. *Id.* at 979.

173. *Id.*

174. 343 U.S. 306 (1952); *see supra* notes 52-60 and accompanying text.

175. 343 U.S. at 308.

ing schedules.¹⁷⁶ Other courts have found that auditing and monitoring procedures were largely *pro forma* acts of a ministerial nature and therefore not excessive.¹⁷⁷

Monitoring to assure that students are not coerced to attend religion classes presents a closer question. The *Zorach* Court, in approving the released time program, had noted the lack of evidence of coercion.¹⁷⁸ Since substantial first amendment rights are at stake, the Court's command that states employ the least burdensome means to achieve their legitimate objectives arguably requires that curtailment of religious meetings ought to await proof of actual coercion, or at least a strong probability of such coercion.¹⁷⁹

The second concern of the no-entanglement requirement, avoiding political division along religious lines, requires assessing the probability that such campus activities will engender community political battles. A student club recognition policy or classroom allocation policy which favors certain religious groups over others risks community dissension. At the other extreme, one court determined that where space is assigned on a first-come-first-served basis, so as to eliminate both the appearance and reality of administrative discretion, the prospect of religious strife resulting from processing applications of rival religious groups for limited space is "imaginary."¹⁸⁰

What if students representing less orthodox religions are unable to form a group due to inability to garner sufficient support? The *Huntington Beach* court, in expressing concern about this possibility, failed to clarify that it is not student debate about religion which the no-political-entanglement requirement seeks to avoid, but the explicitly *political* representation of such conflict among members of the community through the political process.¹⁸¹ The university is insulated from political conflict over religion by (1) its unique status as a "marketplace of ideas,"¹⁸² (2) its greater distance from local control, and (3) the relative

176. *Id.* at 315.

177. *Resnick v. East Brunswick Township Bd. of Educ.*, 77 N.J. 88, 116, 389 A.2d 944, 958 (1978).

178. *See supra* text accompanying note 57.

179. *See infra* notes 238-79 and accompanying text.

180. 77 N.J. at 116, 389 A.2d at 958.

181. *See supra* text accompanying note 30.

182. The Supreme Court has observed that colleges and universities are peculiarly the archetypal "marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972). The Court has sanctioned greater aid to sectarian colleges and universities than would be acceptable to secondary schools, based on the belief that the hearty secular atmosphere of colleges and universities and the public perception of such institutions tend to focus debate on educational and fiscal matters without provoking strong emotion about religion. *See generally*

maturity of its students. On the other hand, the high school is an imperfect marketplace¹⁸³ and local communities take a more direct hand in its affairs;¹⁸⁴ the possibility of religious strife may therefore be correspondingly greater.

However, if community religious groups are likely to take their grievances over school affairs to the political arena,¹⁸⁵ it is not clear how banning religious student groups will resolve the possibility of religious strife. The courts do not appear to have considered the equally plausible hypothesis that such action is reasonably calculated to generate even more animosity and result only in shifting the grievances to other grounds.¹⁸⁶ Thus, banning religious meetings to avoid political divisiveness may be worse than simplistic; it may well be counter-productive.

The no-political-entanglement requirement was developed by the Supreme Court in the aid to public schools context.¹⁸⁷ There are indications that where speech and associational activity are implicated, the Court would not countenance application of the principle merely to prevent political divisiveness along religious lines.¹⁸⁸

Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (plurality opinion); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971) (plurality opinion). The character of the institution benefited is thus one of the three factors formally considered by the Court in evaluating whether excessive entanglement exists as a result of aid to sectarian institutions. The other two factors are the nature of the aid provided and the resulting relationship between government and church authorities. 426 U.S. at 748 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971)). Because no actual aid is involved in a religious meetings case, this test seems inapplicable.

183. See *supra* note 103 and accompanying text.

184. The historic tradition of local control of education is maintained by local school board elections.

185. The methods of bringing local pressure to bear on educators can be easily imagined: complaints to school administrators and boards of education, letter writing campaigns, protest movements, or recall elections.

186. Even the prospect of banning religious meetings from high school campuses commonly provokes immense controversy and turmoil, as religious students and religious community groups organize to press their demands for freedom to assemble on campus. One example furnishes a case study. When California's Saddleback Valley Unified School District considered ordering religious student groups to cease their lunch hour meetings on the district's two high school campuses, on advice of counsel that the meetings were unconstitutional, a battery of approximately one hundred community religious and lay leaders, students and their families jammed publicly held board meetings and carried their grievances to the newspapers in a bitter controversy which continues at this writing. *Los Angeles Times* (Orange County ed.), March 11, 1981, § II at 1, col. 1.

187. See *supra* note 112.

188. In *McDaniel v. Paty*, 435 U.S. 618 (1978), the Court invalidated a state law which disqualified members of the clergy from holding political office. The state's proffered justification for the exclusion was its alleged interest in avoiding sectarian strife. *Id.* at 628-29.

Turning to the permissive form¹⁸⁹ of the no-entanglement requirement, the Eighth Circuit in *Chess v. Widmar*¹⁹⁰ employed this aspect of the *Lemon* test to strike down a university prohibition on religious groups' use of public university buildings. If there is a danger of entanglement associated with religious students' use of such buildings, the court stated, there is a deeper danger of entanglement associated with scrutinizing applications by religious students with a different eye than those by nonreligious students.¹⁹¹ The court believed that "[t]he University's prohibition on worship and religious teaching also hopelessly entangles it in the delicate tasks of defining religion, determining whether a proposed event involves religious worship or teaching, and then monitoring events to ensure that no prohibited activity takes place."¹⁹² The notion that entanglement is often a trade-off, and that some entanglement with religion may be justified on the rationale that the cure may be worse than the disease, has been recognized by the Supreme Court.¹⁹³

Finding a suitable constitutional definition of "religion" has long fascinated the commentators.¹⁹⁴ But the operational difficulty of defin-

While a majority of the Court was unable to agree on a rationale, Justice Brennan, in a concurring opinion joined by Justice Marshall, stated:

The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.

Id. at 641 (Brennan, J., concurring).

189. See *supra* note 164 and accompanying text.

190. 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom.* *Widmar v. Vincent*, 102 S. Ct. 269 (1981); see *supra* notes 84-89 and accompanying text; see also *infra* notes 281-321 and accompanying text.

191. 635 F.2d at 1317-18.

192. *Id.* at 1318. The court noted that the task of defining religion is aggravated by the broadening definition of religion in contemporary society. *Id.* at 1318 n.10.

193. In *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), the Court held that while a grant of exemption of church property used solely for religious worship from property taxes gave rise to some state involvement in religious affairs—as well as indirect economic savings—such involvement was justified on the basis that the alternative, taxation of church property, gave rise to even *greater* involvement through procedures of tax valuation, tax liens, tax foreclosures, "and the direct confrontations and conflicts that follow in the train of those legal processes." *Id.* at 674.

194. Generally, the commentators call for a narrow definition of religion for purposes of the establishment clause because no real danger is posed to freedom of religion by government aid to unconventional religious groups. On the other hand, commentators call for a wider definition of religion for purposes of the free exercise clause because the latter seeks only to vindicate individual liberty rather than to overturn social welfare programs. See J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* 878 (1978). For a general discussion of religious freedom in the public schools, see Pfeffer, *The Supremacy of Free Exer-*

ing and identifying instances of uniquely religious activity is perhaps nowhere better illustrated than in the religious meetings cases.¹⁹⁵ Doubtless much of the activity at such meetings is protected speech and association. This raises several troubling questions. When does an abstract discussion of personal, subjective experience become "religious"? Is the test "sincerity of belief," and, if so, how is this ascertained? Will the state or school district include on its books finespun expositions of specific doctrinal positions and theological abstractions? When does a discussion of sacred texts pass from "cultural" or "historical" to "religious"? Does a common invocation opening a meeting constitute "religious worship" or a prescribed ritual, though the rest of the meeting be devoted to secular finances? Any test which might be devised carries three fatal risks: (1) administrative discretion might be exercised arbitrarily; (2) a prohibition may sweep within its net much protected speech and association; and (3) student groups which survive the test would be the object of constant surveillance to ferret out religious activity with a resulting chill on protected speech.

B. Rights To Free Exercise of Religion¹⁹⁶

Most cases challenging a public school policy prohibiting religious student meetings on school property have included a claim that the policy violates the right to free exercise of religion. In analyzing the right

cise, 61 GEO. L.J. 1115 (1973) [hereinafter cited as Pfeffer]; Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213 (1973).

195. An example of the difficulty of defining religion at the operational level can be found in the procedures of the defendant university in *Dittman v. Western Wash. Univ.*, No. 79-1189 (W.D. Wash. Feb. 28, 1980) (memorandum opinion), *vacated as moot*, No. 80-3120 (9th Cir. Mar. 30, 1982). Under university procedure, requests for space were made to a university administrator who determined whether the proposed activity was religious in nature under the following definition: "Religious worship, exercise, or instruction [including] activity intended to propagate or support any particular doctrine of [sic] belief, or any activity which is a prescribed ritual of any religion." *Id.* at 7-8. If the administrator is unable to determine whether the activity is religious, he or she inquires further; if still uncertain, he or she requires the requesting group to sign a form representing that religious activity will not take place. *Id.* at 8. If the applicant refuses to sign the form, space is denied. *Id.* In *Dittman*, the district court rejected plaintiffs' contentions that this definition was constitutionally vague, and held that the phrase "religious activity" is of sufficient definiteness to enable a reasonably prudent person to know what is intended in the definition and what is not. *Id.* at 9. The court did not consider whether the task of administering the definition excessively entangled the university with religion in violation of the establishment clause. For a recent case in which the Supreme Court acknowledged the impossibility of distinguishing religious worship *qua* speech from ordinary speech, see *infra* notes 285, 301 and accompanying text.

196. See *infra* notes 309-13 and accompanying text.

to free exercise of religion, the Supreme Court has employed a balancing test. A plaintiff must show a substantial burden on the exercise of a sincerely held religious belief. Such a burden will be justified only if the law is necessary to promote a compelling state interest and is the least restrictive means available.¹⁹⁷

Only one court has accepted a religious student group's free exercise claim. The Delaware Supreme Court in *Keegan v. University of Delaware*¹⁹⁸ held that a state university policy denying students the right to use university dormitory "commons" areas for religious worship, where the university permitted students an otherwise free use of the areas, burdened religious students' free exercise rights and that the state had not demonstrated a compelling state interest.¹⁹⁹ When addressing the free exercise claims of religious student groups in the religious meetings context, the approach of most courts has either been to find that the alleged infringement was insubstantial,²⁰⁰ or that the practice of holding religious meetings during the school day was not a matter of deep religious conviction²⁰¹ or, even assuming that infringement was established, that the state's interest in separating church and state or preventing establishment clause violations was compelling.²⁰²

If it is assumed that a state's interest in preventing establishment clause violations is legitimate, it would seem that a ban on religious student meetings on public school property is not a sufficiently "substantial" coercion of religious belief or practice to support a cognizable claim. As the *Brandon* court observed, students at all times remain free to believe and, at least during nonschool time, free to practice their beliefs off campus.²⁰³ However, two obvious concerns have not been recognized by the religious meetings cases, which are taken up in Part

197. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (law requiring members of Amish Church to send their children to public or private school beyond the eighth grade impermissibly burdened free exercise of religion, where central tenet of belief was nonexposure to secular society); *Sherbert v. Verner*, 374 U.S. 398 (1963) (denial of unemployment benefits to Sabbatarian because she refused to work on Saturday due to religious beliefs held violative of free exercise clause).

198. 349 A.2d 14 (Del. 1975), *cert. denied*, 424 U.S. 934 (1976).

199. *Id.* at 19.

200. *Brandon v. Board of Educ.*, 635 F.2d 971, 976-77 (2d Cir. 1980).

201. *Chess v. Widmar*, 480 F. Supp. 907, 917 (W.D. Mo. 1979), *rev'd*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom.* *Widmar v. Vincent*, 102 S. Ct. 269 (1981); see *infra* notes 281-321 and accompanying text.

202. *Dittman v. Western Wash. Univ.*, No. 79-1189 (W.D. Wash. Feb. 28, 1980) (memorandum opinion), *vacated as moot*, No. 80-3120 (9th Cir. Mar. 30, 1982); *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 16-17, 137 Cal. Rptr. 43, 52, *cert. denied*, 434 U.S. 877 (1977).

203. 635 F.2d at 980.

III of this comment: first, the interplay and tension between the accommodation arguably compelled (though perhaps not clearly compelled) by the free exercise clause, and that arguably limited by the establishment clause; and second, whether the means chosen to avoid an establishment of religion are the least restrictive available.²⁰⁴

An interesting question is whether the free exercise clause might be invoked to establish the per se invalidity of a rule banning religious meetings from public schools. It might be argued that a denial of access to vacant classrooms based solely on a group's "religious" status operates directly against the student in the nature of a penalty. At least two members of the Supreme Court have indicated that they might adopt such a position.²⁰⁵

An argument that occasionally is made is that students' rights to the free exercise of religion are infringed when they attempt to rally support to hold meetings or to form a religious student club, but fail—perhaps because they represent a less orthodox religion or perhaps simply because they are inartful advocates. It is argued that the unsuccessful student subjectively experiences his or her religion as "rejected" and is thus "coerced" to conform to the "prevailing" religion.²⁰⁶ This argument appears to be the establishment clause "ostensible endorsement" argument²⁰⁷ redressed in a free exercise gown.²⁰⁸

One way of posing the issue is to ask how far the state must go to protect the sensibilities of students in its charge. In the establishment clause portion of this comment, it is suggested that the Supreme Court's

204. The Supreme Court has observed that there exists a tension between the establishment clause and the free exercise clause. See *Engel v. Vitale*, 370 U.S. 421, 430 (1962) ("these two clauses may in certain circumstances overlap"); see *infra* note 272.

205. Justice Brennan, in a concurring opinion joined by Justice Marshall in *McDaniel v. Paty*, 435 U.S. 618 (1978) (plurality opinion), stated that he would base his condemnation of a state statute which excluded ministers from political office on the ground that the statute penalized the free exercise of religion by "establishing a religious classification as a basis for qualification for a political office" and was therefore per se invalid. *Id.* at 634-37 & n.8 (Brennan, J., concurring).

206. The *Huntington Beach* court speculated that such students may be unable to form a religious club "because of insufficient student support or unavailability of a faculty sponsor. In such event, the free exercise rights of the minority might well be infringed by the pressure upon them to conform to the beliefs of the recognized religious club." 68 Cal. App. 3d at 14, 137 Cal. Rptr. at 50-51.

207. See *supra* text accompanying notes 61-62.

208. In fact, the problem of coercion of students, even that resulting from ostensible state endorsement of religion, is more appropriately analyzed in terms of interference with the right to free exercise of religion, because it is the office of the free exercise clause to guarantee against coercion. *Engel v. Vitale*, 370 U.S. 421, 430 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion . . .").

answer is that the state is constitutionally compelled to protect the sensibilities of students to the extent that the state can be held responsible for creating the impression of sponsorship or ostensible endorsement of the religious content of student groups.²⁰⁹ Absent a finding of ostensible endorsement or sponsorship, and assuming a pristine *laissez faire* school policy, injured sensibilities resulting from an unsuccessful attempt to mobilize student support to form a religious student group appear indistinguishable from those arising from everyday life which the religious student might experience in any instance of religious salesmanship, as, for example, where a religious biology student argues in class for "scientific creationism"²¹⁰ and is met with studied indifference.²¹¹ The common element linking both situations is that the causal relationship between state action "permitting" the religious speech and the hurt sensibilities is either nonexistent, or so attenuated and remote as to render untenable the argument that the state "caused" the alleged coercion.

C. *Freedom of Speech, Association and Equal Protection*

First amendment protection of speech, expression and association "apparently" extends to religious speech, expression and association with the same force and vigor as it does to political or other modes of individual expression. The qualification "apparently" seems necessary because the Supreme Court has never directly held as much.²¹² Instead, in vindicating first amendment claims to free speech, the Court has attached no independent significance to the fact that the speech in question was religiously motivated.

In a prodigious line of cases dealing with religious canvassing and solicitation, the Court has consistently held that the dissemination of

209. See *supra* text accompanying notes 61-62.

210. "Scientific creationism" is the theory that the origin of biological life was the one time creative act of an all powerful God, as distinct from the theory of human biological evolution.

211. Examples can be multiplied. During a recess or school lunch period a religious student exhorts a few peers to adopt his or her religious principles and is coolly rebuffed. Or, in a controversial classroom discussion, a religious student volunteers his or her input and, for authority, cites to a sacred text. In response, he or she is greeted with hostility. On the other hand, another religious student presses claims for his or her religion and is warmly received. In each case the school has "permitted" the activity. But if the school can be said to have "coerced" any student, it is difficult to see how this logic can be contained short of barring all religiously motivated speech from the public school campus.

212. For a recent Supreme Court decision which held that religious and nonreligious speech do not differ in principle in the first amendment context, see *Widmar v. Vincent*, 102 S. Ct. 269 (1981); see *infra* note 285 and accompanying text.

religious information and the distribution of religious literature constitute protected activity.²¹³ Similarly, in the context of licensing schemes regulating the time, place or manner of speech in public places, the Court has extended to religious speech the protections of the doctrines of prior restraint²¹⁴ and constitutional vagueness.²¹⁵ However, because the Court has never squarely been confronted with a case where the free speech and establishment clauses arguably conflict,²¹⁶ it is unclear whether, or to what extent, religious speech must yield to the establishment clause. This section sets forth the applicability of first amendment guarantees in the schools.

1. The first amendment in the public schools

*Tinker v. Des Moines Independent School District*²¹⁷ is the seminal Supreme Court decision dealing with application of first amendment freedoms in the public schools. In *Tinker*, the Court held that first amendment rights apply with the same force in the public school as in the community at large.²¹⁸ In a well known phrase, Justice Fortas,

213. See *Village of Schaumburg v. Citizens For a Better Env't*, 444 U.S. 620 (1980); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (plurality opinion); *Jamison v. Texas*, 318 U.S. 413 (1943); *Largent v. Texas*, 318 U.S. 418 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939).

214. A prior restraint on speech is censorship prior to publication or a condition on speech unless it has the approval of a government official. As a system of inhibiting dangerous or irresponsible speech, it is the alternative to a system of subsequent punishment. Because of the preferred position of the first amendment, and because prior restraints pose the greatest danger of preventing speech altogether, prior restraints have been particularly disfavored. See *Near v. Minnesota*, 283 U.S. 697, 713-16 (1931); see *infra* text accompanying notes 288-91.

In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (plurality opinion), the Court overturned convictions of certain Jehovah's Witnesses who had violated an ordinance by selling books without paying a license tax, holding that dissemination of religious literature constituted activity protected by the first amendment. 319 U.S. at 117. In *Kunz v. New York*, 340 U.S. 290 (1951), the Court reversed a conviction of a Baptist minister for violating an ordinance which prohibited holding a religious meeting on streets without a permit, on the ground that the ordinance was an invalid prior restraint on first amendment speech. *Id.* at 293. The clearest and most recent pronouncement by the Court indicating that the full range of first amendment protection extends to religiously motivated speech came in *Village of Schaumburg*, where the Court held that charitable solicitation for funds and religious evangelism and canvassing are entitled to coequal first amendment status. 444 U.S. at 632.

215. See *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976).

216. But see *infra* notes 281-321 and accompanying text.

217. 393 U.S. 503 (1969) (upholding right of junior and senior high school students to wear armbands in protest to Vietnam War on school campus despite school ban, where the act constituted symbolic speech).

218. *Id.* at 506. Indeed, the Court has recognized that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); see also *Papish v. Board of Curators*, 410 U.S.

speaking for the Court, stated that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."²¹⁹ In another decision, the Court observed that protection of these freedoms is particularly important in the university and college setting, which is peculiarly the "marketplace of ideas."²²⁰ However, Justice Fortas in *Tinker* noted that first amendment rights must be applied "in light of the special characteristics of the school environment."²²¹ Thus, schools may restrict speech if they are able to sustain their burden of proving that the activity will result in substantial interference with school discipline or interfere with the constitutional rights of others.²²²

First amendment protection also encompasses freedom to associate to advance one's personal beliefs.²²³ This principle was applied to the university context in *Healy v. James*,²²⁴ where university students formed a chapter of the Students for a Democratic Society (S.D.S.) and sought recognition as a campus group. Administration officials denied the group recognition because they found its objectives disagreeable and because the S.D.S. parent body had a reputation for disruptiveness.²²⁵ The Court held that the university had not carried its burden of demonstrating that permitting such speech and association would result in substantial interference with school discipline or with the constitutional rights of others.²²⁶

The *Healy* Court stated that "[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes."²²⁷ Denial of access to campus bulletin boards and the school newspaper further circumscribed the right of association in that to "remain a viable

667, 671 (1973) (no "dual standard" to be applied in scrutinizing restrictions on speech); Wright, *The Constitution On the Campus*, 22 VAND. L. REV. 1027 (1969); see *infra* text accompanying notes 281-321.

219. 393 U.S. at 506.

220. *Healy v. James*, 408 U.S. 169, 180 (1972) (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)); see *infra* notes 223-30 and accompanying text.

221. 393 U.S. at 506.

222. *Id.* at 508-09.

223. *NAACP v. Button*, 371 U.S. 415 (1963) (invalidating state statute which would have disbarred attorneys who represented organizations with no pecuniary interest in the litigation; statute aimed at disabling civil rights attorneys).

224. 408 U.S. 169 (1972).

225. *Id.* at 174-76 & n.4.

226. *Id.* at 190-91.

227. *Id.* at 181.

entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students.”²²⁸ Nonrecognition, the Court reasoned, denied the group the ability to “participate in the intellectual give and take of campus debate.”²²⁹ Thus, the fact that the group could still meet off campus did not dilute the significant disabilities imposed by nonrecognition.²³⁰

2. The public forum and the right to equal access

If permitting religious speech on the public campus would constitute an establishment of religion, it might be argued that a policy of discrimination against religious speech is precisely what the establishment clause compels. Uncompromising adherence to this position, however, invites more difficulties: a broad based prohibition on protected speech, based on its content, violates both the right to freedom of speech and to equal protection of the laws.²³¹ In *Police Department of Chicago v. Mosley*,²³² the Supreme Court held that a city ordinance which prohibited all peaceful labor picketing within 150 feet of schools from thirty minutes before commencement of the school day to thirty minutes after conclusion, constituted a burden on fundamental first amendment rights of free speech. The Court stated that absent a compelling state interest, this ordinance amounted to a denial of free speech as well as equal protection in violation of the fourteenth amendment. The Court set forth the fundamental principle:

There is an “equality of status in the field of ideas,” and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.²³³

The concept of the public forum, a well settled constitutional doctrine,²³⁴ thus states a broad rule of equality of access to public and semi-public fora. Speech, association and expression may be regulated

228. *Id.*

229. *Id.* at 181-82.

230. *Id.* at 182-83.

231. See *infra* notes 232-37 and accompanying text; see also *infra* notes 281-321 and accompanying text.

232. 408 U.S. 92 (1972).

233. *Id.* at 96.

234. *TRIBE*, *supra* note 140, at 21; T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRES-*

only as to time, place, or manner and by criteria unrelated to content.²³⁵ The Supreme Court has long condemned discriminatory allocation of public fora to religious groups.²³⁶ The doctrine has been held to apply in the public school and university setting by so many cases that its applicability in this context now appears to be beyond question,²³⁷ though its precise contours may be uncertain.

III. STANDARD OF REVIEW: BALANCING CONFLICTING RIGHTS

In view of the foregoing authorities, religious groups are able to present a formidable *prima facie* case of infringement of their first amendment liberties. Nonreligious high school and university students clearly enjoy first amendment rights to freedom of speech and association on the public campus, which are abridged by denial of access to school facilities or by nonrecognition.²³⁸ In addition, discriminatory allocation of school facilities on the basis of the content of speech de-

SION 303-04, 305-07 (1970); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 29-30 (1965).

235. *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85 (1977) (ordinance banning "for sale" and "sold" signs to reduce white flight from racially integrated town held invalid regulation of content of speech).

236. In *Niemotko v. Maryland*, 340 U.S. 268 (1951), the Court held that a city could not, consistently with the equal protection clause, deny to Jehovah's Witnesses the use of a city park for Bible talks because the city found the Witnesses disagreeable, where the city had permitted the park to be used for "meetings and celebrations" by other community, political and religious groups, such as a Flag Day ceremony of the Order of Elks. *Id.* at 269, 272-73. The Court followed *Niemotko* two years later in *Fowler v. Rhode Island*, 345 U.S. 67 (1953). There the Court invalidated an ordinance which had been construed to apply so as to prohibit a group of Jehovah's Witnesses from holding religious services in the park, though other religious groups had been permitted use of the park. *Id.* at 69-70; see *infra* note 285.

237. See, e.g., *Healy v. James*, 408 U.S. 169, 192-93 (1972) ("Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected."); *Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652, 658 (1st Cir. 1974); *University of S. Miss. Chapter of the Miss. Civil Liberties Union v. University of S. Miss.*, 452 F.2d 564, 566 (5th Cir. 1971); *Lawrence Univ. Bicentennial Comm'n v. City of Appleton*, 409 F. Supp. 1319, 1326 (E.D. Wis. 1976); *Local 1880, Am. Fed'n of Teachers v. Florida Bd. of Regents*, 355 F. Supp. 594, 596 (N.D. Fla. 1973); *Brooks v. Auburn Univ.*, 296 F. Supp. 188, 192 (N.D. Ala. 1969).

A typical illustration of the public forum concept as applied in the public school is found in *Lawrence University*. There a district court held that defendant school board's denial of students' application to rent a high school gymnasium for a speech by Angela Davis, a controversial celebrity, pursuant to a board regulation prohibiting use for religious or political activities unless the activity is nonpartisan or nondenominational, was a *per se* violation of first amendment rights because it regulated speech on the basis of content. 409 F. Supp. at 1323. In addition, denial was held to violate the equal protection clause under the rule of *Mosley*, since the board had allowed other groups to use the gym as a public forum but had denied it to plaintiffs to censor the group's ideas. *Id.* at 1324.

238. See *supra* notes 213-30 and accompanying text.

nies freedom of speech and equal protection.²³⁹ If religious speech is equated with political or other nonreligious speech, religious groups may argue, accommodation to permit religious meetings on campus is compelled. Yet the establishment clause, in certain circumstances, arguably compels a different result.

There would appear to be no escape from attempting some reconciliation of these apparently conflicting constitutional commands. Surprisingly, however, the courts have offered no systematic analysis which recognizes the need for such reconciliation. Some courts omit reference to any first amendment rights and seek guidance from establishment clause cases dealing with aid to parochial schools.²⁴⁰ Other courts assume first amendment rights do not apply.²⁴¹ Still other courts assume that the establishment clause does not apply.²⁴²

One area of tension is the conflict between the establishment clause and the public forum doctrine.²⁴³ The Eighth Circuit in *Chess v. Widmar*²⁴⁴ applied the doctrine in the context of religious meetings in public university facilities, holding that the defendant university may not deny access to facilities on the basis of the religious content of the student group's speech.²⁴⁵ However, the court had no occasion to consider how to reconcile the two constitutional commands since it found no establishment of religion.²⁴⁶ The court appeared to assume that government could never be guilty of an establishment of religion when it allocates access to a public forum on an even handed basis.²⁴⁷

239. See *supra* note 231 and accompanying text.

240. E.g., *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977).

241. See *infra* notes 248-51 and accompanying text.

242. See *infra* notes 244-47 and accompanying text.

243. See *supra* notes 231-37 and accompanying text.

244. 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom. Widmar v. Vincent*, 102 S. Ct. 269 (1981); see *infra* notes 281-321 and accompanying text.

245. 635 F.2d at 1315-16.

246. *Id.* at 1317.

247. This argument has some support. In *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979), the court held that where a public forum, *viz.*, the National Mall in Washington, is allocated on a nondiscriminatory basis to religious and nonreligious groups alike, no establishment clause problem arises either from the standpoint of financial benefits or ostensible endorsement. *Id.* at 936-37. Furthermore, while the Supreme Court has consistently upheld the rights of religious groups to use public fora such as streets and parks, the Court has never suggested that use by such groups constitutes an establishment. See *supra* note 236 and accompanying text. Arguably, therefore, where the public forum doctrine applies, there can be no establishment of religion.

The Supreme Court has not yet applied the public forum doctrine in the public schools in any religion context. But see *infra* notes 281-321 and accompanying text. Indeed, the

The Second Circuit in *Brandon v. Board of Education*²⁴⁸ also avoided reconciling the two by taking a converse, but equally absolutist, approach to the relationship between the public forum doctrine and the establishment clause. The court found an establishment of religion but held that a high school is not a public forum,²⁴⁹ thereby drawing in question once again the applicability of the public forum doctrine in public schools. The court stated that while the facilities of a university have been held to be a public forum, a high school classroom is not, noting the greater risk of an establishment clause violation.²⁵⁰ This conclusion appeared to be contrary to the weight of authority.²⁵¹

Both the *Chess* and *Brandon* courts avoided a conflict between the establishment clause and the public forum doctrine by taking the absolutist position that either one or the other applies, but never both.²⁵² This expedient analysis was achieved at the expense of failing to recognize that elements of both may coexist in the same case: the high school has certain features of a public forum, although permitting religious speech may constitute a potential establishment of religion under

Andrus court itself cautioned that different considerations might apply in a public school setting due to the unique susceptibility of children to coercion. 613 F.2d at 936.

248. 635 F.2d 971 (2d Cir. 1980).

249. *Id.* at 980.

250. *Id.* In justifying its conclusion that a high school is not a public forum, the court referred to "sensitive Establishment Clause considerations" which limit students' rights to air religious doctrine. *Id.* Presumably, the court was referring to greater relative youth and impressionability of high school age students. The court, therefore, left unclear whether it meant that high schools are not public fora for any purpose, or only for purposes of religious speech.

251. See *supra* note 236 and accompanying text.

252. Some courts have argued that the public forum cases are inapposite in the religious meetings context, by observing that the classical situs for application of the rule of equal access has been public streets and parks. See, e.g., *Chess v. Widmar*, 480 F. Supp. 907 (W.D. Mo. 1979), *rev'd*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom.* *Widmar v. Vincent*, 102 S. Ct. 269 (1981); see *infra* notes 281-321 and accompanying text.

Clearly, access to streets and parks, because of their obvious suitability for public expression, has been the object of special protection by the Supreme Court. See *Saia v. New York*, 334 U.S. 558, 561 (1948), for discussion of the significance of public streets and parks. By contrast, expression in public schools is subject to more ambitious regulation as to time, place and manner of expression in order not to cause disruption of educational activity or conflicts in assigned space. See *infra* text accompanying notes 253-54.

Clearly there is no constitutional right to school facilities on demand. See *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953). Religious groups have no more claim to facilities not otherwise available for general use than any other campus group, especially when such use would interfere with the school day. *Stein v. Oshinsky*, 348 F.2d 999, 1001 (2d Cir. 1965). But the same is true of streets and parks, access to which is usually conditioned by local authorities on obtaining a proper permit. The inquiry in both contexts, therefore, is not the nature of the forum as such, but the validity of the prior restraint. See *supra* note 210 and accompanying text.

certain circumstances. The traditional approach has been to recognize that public facilities, including high schools, are at least semi-public fora where speech is subject only to reasonable time, place or manner regulations, but where characteristics unique to the facility may be taken into account in adjudging the reasonableness of such regulations.²⁵³ One commentator summarized the special manner in which courts have applied the public forum doctrine in the public facilities context:

Public facilities like schools and libraries, created not primarily for public interchange but for purposes closely linked to expression, have been treated as semi-public forums, with government enjoying power to preserve such tranquility as the facilities' central purpose requires—a power that would be denied in a true public forum—but no power to exclude peaceful speech or assembly compatible with that purpose.²⁵⁴

One approach which might obtain for religious student groups maximum enjoyment of first amendment rights, while avoiding an establishment problem, would be to vest in school administrators authority to prescribe reasonable restrictions on the time, place or manner of admittedly²⁵⁵ religious activities—closely tailored to achieving the important interest in avoiding an establishment of religion and unrelated to content. One of the factors which may be considered in determining the reasonableness of such restrictions is the special insulation public schools enjoy from religious coercion.²⁵⁶ The restrictions, however, may impose no disability beyond that strictly necessary to avoid an establishment of religion. Under this view, a categorical ban on religious meetings would be directly related to content, and hence invalid; but more limited restrictions related to the neutral and special characteristics of the audience, such as its peculiar susceptibility to coercion, would be valid, with more ambitious restrictions permissible in the

253. See *Tinker*, 393 U.S. at 506 (first amendment rights must be applied "in light of the special characteristics of the . . . environment"); see also *supra* note 252.

254. *TRIBE*, *supra* note 140, at 690.

255. Student groups which do not concede the religious character of their proposed activity would compel the school to engage in the difficult and entangling task of defining religion. See *supra* text accompanying notes 189-95.

256. In fashioning restrictions on a case by case basis to avoid the ostensible endorsement of religion, schools might limit admittedly religious groups to meeting only during lunch periods or before and after class periods in unoccupied facilities, removed from nonparticipating students. In addition, nonstudent religious representatives, such as clergypersons and church leaders, might be denied access to the campus to restrain their participation in the student religious group's activities.

high school than in the university setting.²⁵⁷

A second area of tension concerns the relationship between the establishment clause and direct burdens on speech, association, and free exercise interests. In the religious meetings cases, the courts have struggled to fit the square peg of free speech and equal protection doctrines into the round hole of the establishment clause. In *Dittman v. Western Washington University*,²⁵⁸ the court conceded that the permit system at issue²⁵⁹ did "unquestionably constitute a prior restraint."²⁶⁰ To justify the restraint, the court searched for a "clear and present danger which the University has the right to prevent."²⁶¹ The court then identified the feared evil as a violation of the establishment clause, and held that the state had a "compelling interest" in preventing regular use of its facilities for religious purposes to avoid a violation of the establishment clause.²⁶² Likewise, the court in *Brandon v. Board of Education*²⁶³ held that the school board's refusal to permit high school students to conduct prayer meetings on campus prior to commencement of classes did not violate the students' rights to freedom of speech, association or religion because avoiding an establishment of religion

257. The difficulty with time, place and manner restrictions on religious meetings is that, unless nonreligious student groups are subject to similar disabilities, it is hard to escape the conclusion that such regulations thinly disguise regulation by religious content. It is arguable whether such restrictions are a classification by content or by type. Religious speech might be viewed as *sui generis*, a special category of speech, in the way that commercial speech was traditionally viewed. See *Valentine v. Chrestensen*, 316 U.S. 52 (1942). However, the Supreme Court has not only declined to carve out a special category of "religious speech," but has exhibited a trend to abandon nice distinctions between categories of protected speech. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 748 (1976) (rejecting doctrine that "commercial speech" is outside of first amendment protection—though commercial speech may be regulated in ways not appropriate for "core" first amendment speech). In short, a more forthright approach for reconciling the establishment clause with the public forum doctrine seems to be called for. See *infra* notes 274-79 and accompanying text. For a discussion of the Supreme Court's most recent analysis of religious speech, see *infra* note 285 and accompanying text.

258. No. 79-1189 (W.D. Wash., Feb. 28, 1980), *vacated as moot*, No. 80-3210 (9th Cir. Mar. 30, 1982).

259. See *supra* note 195.

260. No. 79-1189, slip op. at 8.

261. *Id.*

262. *Id.*

The *Dittman* court explained its view of the relationship between the establishment clause and freedom of speech and association: "Religious expression cannot, however, be completely equated with political expression. . . . Distinctions based upon the religious nature of speech are permissible if government accommodation to religious speech violates the Establishment Clause" *Id.* at 3.

263. 635 F.2d 971 (2d Cir. 1980).

furnished the state with a compelling interest.²⁶⁴

The notion that prevention of an establishment of religion is a legitimate and compelling state interest, which can lay a predicate for curtailment of speech, association, and free exercise activity, is novel. The idea seems so simple and straight a path out of the dark conceptual forest that it no doubt appeared to these hapless courts—which were charting new paths without the compass of precise precedents—as the answer to all prayers.²⁶⁵

The idea is not without its problems, however. The Supreme Court had occasion to consider whether avoidance of an establishment of religion is a legitimate state interest in *McDaniel v. Paty*,²⁶⁶ but found the question unnecessary to decide.²⁶⁷ The issue therefore awaits final decision by the Supreme Court.²⁶⁸ In the interim, the Court has declared that the proper grounds for curtailment of expression and association rights on the public school campus are the likelihood of campus unrest or invasion of rights of other students²⁶⁹—not prevention of

264. *Id.* at 978.

These courts appear to have assumed that the establishment clause marks the outer boundary of speech and association freedom. It is noteworthy that the *Dittman* court, only a few lines before its announcement that religious expression cannot be equated with political expression, *see supra* note 262, acknowledged that “religious speech is to be afforded the same protections afforded political speech.” No. 79-1189, slip op. at 3 (citation omitted). It is difficult to know what to make of these statements, other than that these courts take the position that all other liberties must yield to the establishment clause. It is clear that, in so holding, they take away with one hand the very equality of status which they have given religious speech with the other.

265. The analogy to a “compelling state interest,” borrowed from “strict scrutiny” analysis, furnished a convenient handle. Under established doctrine, state action burdening exercise of fundamental rights must be supported by a governmental interest which can be termed “compelling” and must be the least burdensome means to achieve the objective. *See* *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (durational residency requirements burdening fundamental right to travel); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (withholding unemployment compensation benefits from Sabbatarian unwilling to work on Saturday burdening fundamental right to free exercise of religion); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (statute authorizing mandatory sterilization of certain convicts burdening fundamental right to procreation).

266. 435 U.S. 618 (1978).

267. *Id.* at 628. It had been argued that such an interest justified infringement of a minister's rights to free exercise of religion incident to an exclusion of the clergy from state political offices. The plurality invalidated the statute on the ground that the evil which the state had sought to avoid, injection of partisan religious strife into the political process, was imaginary in any event. *Id.* at 628-29.

268. For a recent Supreme Court decision adopting the compelling state interest test in the religious meetings context, *see* *Widmar v. Vincent*, 102 S. Ct. 269 (1980); *see infra* note 291 and accompanying text.

269. *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 508-09 (1969); *see supra* note 222 and accompanying text.

establishment clause violations. In no religious meetings case was there evidence that permitting student religious meetings was likely to lead to disorder or invasion of other students' rights.

Whatever currency such an interest may have as a justification for excluding church schools from government subsidies, a quite different situation arises where fundamental rights are at stake,²⁷⁰ especially where the proffered interest is no ordinary objective of government, but is itself a fundamental right expressly guaranteed by the Constitution.²⁷¹ In short, fundamental rights are being pitted against one another.

The question before a court in a religious meetings case is to define the rights of all students. Under the *Dittman* and *Brandon* analyses, rights to freedom of speech, association and free exercise must always yield to an establishment clause violation. Now one must agree that if the establishment clause is violated, exercise of such rights must cease. But one can know that the establishment clause is violated only if he or she first knows that in a contest between the establishment clause and any other constitutional guarantee, the establishment clause always wins. However, the courts do not explain by what criteria they make this value judgment;²⁷² in fact, they are arguing in a circle. Thus, the

270. It is arguable that such a state interest provides a rational basis for differential treatment of public and private schools with respect to receipt of state largesse; the private religious school has no *independent* claim to public benefits. See *Lutkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd per curiam*, 419 U.S. 888 (1974). By contrast, in the religious meetings context, religious students have fundamental rights to freedom of speech and association. The theory that a state may assert and promote an interest which consists of separating church and state further than required by the establishment clause suggests that a state is free to override, as a matter of *state law*, federal constitutional guarantees. It was settled early, however, that a state law is of no effect where it conflicts with the United States Constitution. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); see *infra* note 294.

271. Freedom from a state establishment of religion has been held to be a fundamental right. See authorities cited *supra* note 9.

272. There is good reason to question the desirability of elevating the establishment clause to so preeminent a position in the hierarchy of constitutional rights. The commentators interpret the Supreme Court's freedom of religion cases to stand for the proposition that where conflict between the free exercise clause and the establishment clause exists, the free exercise clause should be dominant. See *TRIBE*, *supra* note 140, at 833-34. For example, a state must modify its unemployment compensation requirement that potential beneficiaries be willing to work on Saturdays in order to accommodate the needs of those who are religiously opposed to work on Saturdays, but willing to work on Sundays instead. *Sherbert v. Verner*, 374 U.S. 398 (1963). Though arguably the state is thereby establishing a religion of Sabbatarianism, "only an illusory and hostile neutrality would be achieved by pursuing a religion-blind constitutional ideal." *TRIBE*, *supra* note 140, at 821; see also *Pfeffer*, *supra* note 194. Professor Tribe refers to the intersection of classifications required by the free

chief difficulty with the *Dittman-Brandon* analysis is that it is a *petitio principii*.

It is not sufficient simply to advert to the establishment clause. It is suggested that a court's task in deciding a religious meetings case is to assay the interests served by the establishment clause and to weigh these against the deprivation of freedom of speech, association and free exercise rights which necessarily would accompany a determination that the establishment clause should assume priority. To effectuate the commands of the establishment clause, the means chosen must be the least burdensome alternative on the exercise of first amendment freedoms.²⁷³ In most cases the establishment issues that would be of greatest concern would be prevention of ostensible endorsement and subtle coercion to religion.

Under this analysis, the state could suppress religious meetings only where the threat or reality of coercion is clear and immediate, as distinct from speculative or remote, and where the danger to unwilling

exercise clause and arguably condemned by the establishment clause as the "*zone of required accommodation*." *TRIBE, supra* note 140, at 821 (emphasis in original).

In addition, Professor Tribe takes the position that classifications arguably required by the free exercise clause (though not clearly required), and arguably condemned by the establishment clause, intersect to carve out of the establishment clause a "*zone of permissible accommodation*." *TRIBE, supra* note 140, at 823 (emphasis in original). It might thus be said that permitting religious meetings is arguably required by the free exercise clause, *cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972) (excusing religious students from compulsory school attendance laws after eighth grade to permit private religious training and education), and arguably condemned by the establishment clause. According to this view, a state could constitutionally accommodate religious students by permitting religious meetings under appropriate circumstances.

At least one other constitutional guarantee predominates over the establishment clause: freedom of speech. The only way in which to reconcile the Supreme Court's public forum cases, *see supra* note 236 and accompanying text, with the establishment clause is to conclude that speech is valued more highly by the Court than establishment clause problems. In each case where religious groups were held to have coequal rights of access to and use of public streets and parks, an establishment clause violation could have been predicated on a theory either of ostensible endorsement or financial benefit to religion.

273. The Supreme Court has indicated that the alternative of a disclaimer is preferable to a total eclipse of free speech. *See supra* note 105. The courts have not considered the possibility of diluting the appearance of ostensible school endorsement of religion by a widely and effectively promulgated notice by which the school disclaims any endorsement of a religious creed. Similarly, a court might consider that when according formal recognition to a student religious club would result in excessive entanglement or ostensible endorsement, rather than banning all religious student group meetings, a school might be required to regard such groups as free and voluntary associations, thus eligible for access to classrooms—albeit without all the rights accorded nonreligious student groups. No denial of equal protection could be made out since the differential treatment accorded student groups would be viewed as the product of a delicate weighing of the various fundamental rights at stake.

students substantially outweighs, either in magnitude or proximity, the burden on religious students resulting from loss of associational and speech activities. In weighing the respective burdens and risks, a court might consider the following factors: the nature of the institution,²⁷⁴ the age and maturity of the students,²⁷⁵ the extent to which the religious meetings are purely the product of student effort or are significantly dependent upon the state for their existence,²⁷⁶ and the degree to which an accommodation of religion would otherwise be appropriate.²⁷⁷ Effectuating the least burdensome alternative may, in certain cases, call for affirmative accommodation of religious students by the public school.²⁷⁸

If, as a consequence of securing the goals of religious freedom and freedom of speech and association, the effective scope of religious influence is widened or narrowed, it will not be due to any assistance or hindrance by the state. The scope of religious influence will be commensurate with the zeal of its advocates and the attractiveness of its ideas.²⁷⁹

274. The status of a university as a "marketplace of ideas" and the need for a student group to have high visibility on campus in order to place its ideas in competition with those of other student groups, *see supra* notes 225-30 and accompanying text, argues strongly in favor of the predominance of speech and association interests in the university context. In addition, as the *Chess* court noted, university students rely upon the campus as their "total community" and can expect a greater accommodation than high school students. In short, the environment of the university may be determinative in this context. *See infra* note 287.

275. University students are expected to possess sufficient intellectual sophistication in most situations, high school students in fewer situations, and grade school students almost never.

276. If, for example, the religious student group is dependent upon financial stipends from the school, the meetings lack the required independence of voluntary student effort.

277. *See supra* note 271.

278. The school might restrict religious student groups to specified times and places, such as before or after school or during lunch periods, to dispel any appearance of a curricular tie-in. Rather than accord formal recognition, the school might regard the groups as free and voluntary associations. *See supra* note 273. Finally, if state law or school policy required a web of school-student oversight, actually or potentially entangling the school in religious affairs, a court should closely scrutinize the regulations to ascertain whether some less intrusive regulations might achieve the same objectives.

Professor Tribe has noted:

If individuals and groups are to enjoy meaningful religious freedom, the protection afforded by the free exercise clause must vary with the extent of governmental regulation and subsidy in society generally. . . . [W]e must consider whether a nation committed to religious pluralism must, in the age of the affirmative state, make active provision for maximum diversity; we must ask whether, in the present age, religious tolerance must cease to be simply a negative principle and must become a positive commitment that encourages the flourishing of conscience.

TRIBE, *supra* note 140, at 834.

279. *Cf. Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We sponsor an attitude on the part

IV. CONCLUSION

The wall of separation between church and state embodied in the establishment clause does not mandate a *per se* rule prohibiting religious meetings on public school property. Religious student meetings do not in all circumstances bear the earmarks of those elements of affirmative sponsorship or ostensible endorsement of religion condemned by the establishment clause. So long as the meetings are voluntary and tailored to avoid the risk that nonparticipating students will be coerced, state action permitting such meetings does not impermissibly advance religion. Nor is there excessive entanglement with religion associated with such meetings.

Substantial first amendment rights to freedom of speech, association and free exercise of religion are eclipsed by exclusion of religious groups' meetings from the public campus. Accordingly, only by a delicate balancing of the competing and important interests which are at stake can religious students in the public schools enjoy those first amendment freedoms which they brought with them through the schoolhouse gate.²⁸⁰

V. POSTSCRIPT

During the writing of this comment, the United States Supreme Court had not decided a case involving student religious meetings on a public school or university campus. While this comment was being printed, however, the Supreme Court decided *Widmar v. Vincent*,²⁸¹ in which the Court affirmed the Eighth Circuit's decision in *Chess v. Widmar*.²⁸² The *Widmar* Court's holding was a narrow one:

Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under the applicable constitutional standards.²⁸³

In *Widmar*, the Court explicitly recognized for the first time the

of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.").

280. See *supra* text accompanying note 219.

281. 102 S. Ct. 269 (1981).

282. 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom.* *Widmar v. Vincent*, 102 S. Ct. 269 (1981); see *supra* notes 83-86, 100, 134-37, 152-54, 187-90, 198, 239-42, & 247 and accompanying text.

283. 102 S. Ct. at 278.

rights of religious students in public universities actively to promote religious ideas within the competitive intellectual marketplace.²⁸⁴ In addition, the Court explicitly acknowledged religious worship and discussion as forms of speech and association protected by the first amendment.²⁸⁵ *Widmar* thus confirmed much of the analysis and many of the conclusions set forth in this comment. Because the Court expressly limited its holding to the case before it and based its decision solely on rights of free speech and association,²⁸⁶ many questions remain unanswered. This postscript briefly explores those questions and the reach of the *Widmar* decision.

The *Widmar* Court began its analysis with a reaffirmation of the rule that students retain first amendment rights of speech and association on the public university campus.²⁸⁷ Moreover, the Court stated that the public university campus is, for its students, a qualified public forum.²⁸⁸ By providing space for student groups, the University of Missouri had "created a forum generally open for use by student

284. *Id.* at 272-73. This comment suggests this right. See *supra* notes 209-32 and accompanying text.

285. *Id.* at 274. The majority of the Court viewed this proposition as well established, citing, among other cases, *Niemotko v. Maryland*, 340 U.S. 268 (1951). For a discussion of *Niemotko*, see *supra* note 231. As noted by Justice White in his dissenting opinion, however, the cases cited do not stand for this precise proposition. 102 S. Ct. at 281-82 n.2 (White, J., dissenting). Although the proposition may be inferred from these cases, *Widmar* is the first case in which the Court has directly considered the paradoxical assertions that certain speech is at once protected by the first amendment's free speech clause and condemned by its establishment clause. See *supra* notes 209-11 and accompanying text.

Justice White argued for a distinction between "religious worship" *qua* speech and speech *about* religion; he contended that the latter should be protected by the first amendment, and the former should not. 102 S. Ct. at 281 (White, J., dissenting). Religious worship cannot be protected by the first amendment, according to Justice White, else the "Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." *Id.* at 282.

The majority, viewing religious worship *qua* speech as indistinguishable in principle from other protected speech, rejected Justice White's distinction on three grounds: (1) it is impossible to ascertain when hymn singing, scripture reading, and biblical teaching cease to be protected "speech" and become unprotected "worship"; (2) administering the distinction at the operational level would require inquiry into the significance of the acts and thus would improperly entangle the public school and the courts with religion; and (3) the distinction is irrelevant because it is not clear that a state provides greater support to religion by permitting religious worship among converts than by permitting admittedly protected proselytizing. *Id.* at 274 n.6.

286. *Id.* at 276 n.13, 278.

287. *Id.* at 273 n.5. The Court observed that the "college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Id.* (quoting *Healy v. James*, 408 U.S. 169, 180 (1972)); see *supra* notes 217-30 and accompanying text.

288. 102 S. Ct. at 273 n.5. This comment urges recognition of this principle. See *supra* notes 231-37 and accompanying text.

groups.”²⁸⁹ The exclusion of religious student groups, the Court stated, was a form of discrimination based on the desire to use this forum to engage in protected religious worship and discussion.²⁹⁰ To justify this discriminatory exclusion of speech, “the University must . . . satisfy the standard of review appropriate to content-based exclusions. It must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”²⁹¹

The Court next examined the University’s proffered interest in excluding the religious student groups. The University claimed a compelling interest in meeting its obligations under the Federal and Missouri Constitutions to avoid an establishment of religion.²⁹² The Court declared, without elaboration, that a state interest in maintaining a strict separation of church and state is not only legitimate, but “compelling.”²⁹³

According to the Court, however, the University’s “equal access” policy would not have the primary effect of advancing religion.²⁹⁴ Accordingly, the University’s asserted interest, under the circumstances presented, did not justify the exclusion.²⁹⁵ While religious groups admittedly would benefit from the open forum policy, the Court was “satisfied” that any religious benefits of an open forum at the University

289. *Id.* at 273.

290. *Id.* at 274. Prior to *Widmar*, it was unclear whether according different treatment to religious speech was to be considered a form of discrimination or merely the inevitable result of establishment clause prohibitions. *See supra* note 257. *Widmar* does not entirely eliminate the uncertainty, however, because there the Court determined that there was no violation of the establishment clause; accordingly, the Court did not have to decide whether the establishment clause may in some cases effectively *compel* discrimination against religious speech.

291. 102 S. Ct. at 274.

292. *Id.*

293. *Id.* at 275. This comment suggests that a state’s obligation to comply with its constitutional obligations could not appropriately be characterized as an “interest” of government and analyzed under the compelling state interest test. *See supra* notes 265-69 and accompanying text.

294. 102 S. Ct. at 276. The University of Missouri also argued that because the Missouri Constitution imposed more stringent prohibitions against indirect state support for religion than the Federal Constitution, the state had a compelling interest in ensuring greater separation of church and state than is required under the Federal Constitution. *Id.* at 277. The *Widmar* Court noted, however, that such a state interest is circumscribed by the free exercise clause and, in this case, by the free speech clause. Accordingly, the Court was “unable to recognize the State’s interest as sufficiently ‘compelling’ to justify content-based discrimination against [the students’] religious speech.” *Id.* The Court expressly declined to decide whether “a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment.” *Id.* (citing the supremacy clause, U.S. CONST. art. VI, § 2). This comment suggests a negative answer. *See supra* note 270.

295. 102 S. Ct. at 277.

"would be 'incidental' within the meaning of our cases."²⁹⁶

Two "factors" were said to be "especially relevant" to the determination of primary effect in *Widmar*.²⁹⁷ First, the Court stated that "an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices."²⁹⁸ Second, "the forum is available to a broad class of non-religious as well as religious speakers"²⁹⁹ Yet, the Court did not view an "equal access" policy as a universal solvent for all establishment clause concerns; the Court implicitly, but clearly, adopted a facts and circumstances test for the issue of primary effect, the precise contours of which were not delineated.³⁰⁰

Potential problems of "entanglement with religion" were relegated to a footnote. The Court agreed with the Eighth Circuit that the university would risk greater entanglement with religion by attempting to enforce its exclusion of religious speech.³⁰¹

Widmar leaves several questions unanswered. The first question is what the result will be where the forum is *not* already made generally available to student groups. The *Widmar* Court particularly emphasized the equal access features of the case, distinguishing it from those cases in which state and lower federal courts have invalidated statutes permitting school facilities to be used by religious groups, but *not* by others.³⁰² The Court observed that in those cases the state may appear

296. *Id.* The Court offered no explicit analysis of the *financial benefit* issues, leaving open the possibility that in other circumstances the financial benefit infirmity may not necessarily be cured by an equal access policy. See *supra* notes 110-52 and accompanying text. *Widmar* unquestionably demonstrates, however, that a challenge to an equal access policy on financial benefit grounds will seldom, if ever, be successful.

297. 102 S. Ct. at 276.

298. *Id.* The Court also observed that university students are less impressionable than younger students, *id.* n.14, and that a university is peculiarly the marketplace of ideas. *Id.* at 273 n.5. The Court thus confirmed this comment's analysis and conclusions on this point. See *supra* notes 63-109 and accompanying text.

299. 102 S. Ct. at 277. "The provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Id.* This conclusion was supported by past decisions. See *supra* notes 122-26 & 146-47 and accompanying text.

300. This comment suggests the need for such a test, and sets forth relevant criteria. See *supra* notes 274-78 and accompanying text.

301. 102 S. Ct. at 275 n.11.

302. *Id.* at 275 n.10, 276 n.13. One of the cases which the Court purported to distinguish was *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980), which involved a high school setting. See *supra* notes 71-79 and accompanying text. The *Widmar* Court stated that, unlike the instant case, the facilities denied to the religious students in *Brandon* were not available to other groups, and that the students in *Brandon* asserted only free exercise claims. 102 S. Ct. at 276 n.13. In brief, the Court explained, *Brandon* was not an "equal access" case. This critical distinction, however, is based on a serious misstatement of the facts and the students' claims in *Brandon*. The high school facilities in *Brandon* were made generally available to other students, and the religious students in that case *did* assert rights to free

to have ostensibly endorsed the speaker.³⁰³ This comment suggests that there is no right to facilities on demand,³⁰⁴ but the mere circumstance that only religious students avail themselves of the forum, or are the first to be extended the privilege, is properly only one factor to be considered in determining the question of primary effect.³⁰⁵

A second question remaining after *Widmar* is whether the same analysis applies in the *high school* setting. This comment suggests that an equal access policy instituted in a high school does not differ in first amendment principle from that in a college or university; that is, a public high school generally may not constitutionally exclude religious student groups and speakers from a public forum.³⁰⁶ The circumstances unique to the high school context, however, are factors to be taken into account in determining the establishment clause issues of primary effect and risk of entanglement.³⁰⁷ Thus, it is suggested that a high school may properly exclude religious speech only if, upon a proper balancing of the competing constitutional interests, the interests served by the establishment clause in a particular case clearly outweigh the values inherent in freedom of speech, freedom of association, and free exercise of religion.³⁰⁸

A third unanswered question concerns the extent to which rights to free exercise and equal protection are implicated by the exclusion of religious speech from the public campus. The *Widmar* Court based its decision solely on rights of free speech and association³⁰⁹ and expressly declined to reach the question of the extent, if any, to which free exercise and equal protection interests are infringed by the challenged regulation.³¹⁰ In a case where free speech and association rights do not

speech, association, and equal protection. 635 F.2d at 979-80. This erroneous distinction is particularly unfortunate because it will undoubtedly become a controlling factor in future religious meetings cases.

303. 102 S. Ct. at 275 n.10.

304. See *supra* note 252 and accompanying text.

305. See *supra* notes 275-78 and accompanying text.

306. See *supra* notes 274-75 and accompanying text.

307. See *supra* notes 274-75 and accompanying text.

308. See *supra* notes 273-78 and accompanying text; cf. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1980) (setting forth test for power of state to impose criminal sanctions on third persons who are strangers to state proceedings for publishing information regarding confidential proceedings).

309. 102 S. Ct. at 276 n.13. The Court also stated: "We limit our holding to the case before us." *Id.* at 277; see also *id.* at 278 n.20 ("Our holding is limited to the context of a public forum created by the University itself.").

310. *Id.* at 276 n.13.

loom so large,³¹¹ aggrieved religious students could, of course, assert free exercise and equal protection claims against a public school or university. Thus, the analysis of the free exercise issues set forth in this comment should apply in such cases.³¹² With respect to an equal protection claim, on the other hand, the Court, having ignored the equal protection clause entirely in *Widmar*, may have jettisoned equal protection doctrine from the analysis of content-based exclusions of speech.³¹³

Another question left unanswered by *Widmar* is how the Court would analyze potential entanglement problems in a case where the provisions of state or local law require a public school or university to exercise more intrusive monitoring and supervision of student activities than occurred in *Widmar*. This comment suggests an answer:³¹⁴ a court should ascertain, among other things, whether a less intrusive regulation could accomplish substantially the same objectives, and whether a student religious group could be accorded the less formal status of a free and voluntary association if recognition as a campus "club" would impermissibly entangle school authorities with religion.³¹⁵

Finally, and most significantly, *Widmar* did not reach the most central and troublesome questions presented by the religious meetings cases to which this comment is primarily addressed: "the questions that would arise if State accommodation of Free Exercise and Free Speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause."³¹⁶ This comment urges the need for a fresh analytical framework for achieving a direct and forthright reconciliation between these conflicting rights, in the nature of a balancing test.³¹⁷

The most interesting question remaining after *Widmar* is how the Court will reconcile these conflicting provisions in a future case. The *Widmar* Court clearly did not adopt anything like the balancing test

311. Such a case may arise where a public school has not created a public forum or has made no content-based exclusion of speech.

312. See *supra* notes 197-205, 238-79 and accompanying text.

313. The Court has already held that a content-based exclusion of speech may abridge both the free speech and equal protection clauses. See *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); see also *supra* notes 231-36 and accompanying text. In *Widmar*, in holding the content-based exclusion of speech unlawful, the Court based its decision solely on free speech and association rights without reference to the equal protection clause.

314. See *supra* notes 273, 278 and accompanying text.

315. See *supra* notes 273, 278 and accompanying text.

316. 102 S. Ct. at 276 n.13.

317. See *supra* notes 240-78 and accompanying text.

urged by this comment; it applied the traditional compelling state interest test appropriate to any form of prior restraint.³¹⁸ Of course, having found no conflict in *Widmar*, there were no conflicting interests to balance. The Court thus left open the possibility that some form of balancing may be appropriate where these fundamental rights are in conflict.

On the other hand, in *Widmar*, as in any religious meetings case, the prohibitions of the establishment clause were at least *arguably* in conflict with rights to free speech, freedom of association, and free exercise; that is, the fundamental interests served by the establishment clause were—and in nearly every religious meetings cases are—implicated, albeit not so substantially as to constitute an establishment of religion.³¹⁹ The Court nevertheless applied traditional strict scrutiny, which this comment suggests was insufficient. Because the prohibitions of the establishment clause were at least *arguably* implicated, the Court's application of the compelling state interest test leads to the inescapable inference that in the future the Court will extend the application of this test to a case where such rights are *clearly* in conflict.

Assuming that the Court will apply the compelling state interest test to reconcile these conflicting rights in a future case, the critical question is how they can satisfactorily be resolved by this standard. This comment eschews the application of this test in the religious meetings context because, as ordinarily applied, it is an invitation to engage in circular reasoning: to find in a given case that a state's asserted interest in separating church and state is sufficiently "compelling," that is, that the establishment clause ought to prevail over other first amendment rights, is "to announce an inevitable result, and the test is no test at all."³²⁰

Only imagination limits the number of "tests" which can be devised. The exact formulation of the test that is ultimately employed, however, is less important than the recognition that the question of an establishment clause violation cannot be decided in isolation from the question of the infringement of other fundamental first amendment rights. Accordingly, it is suggested that if the compelling state interest test is so employed, part of a court's determination of whether a state's asserted interest in separating church and state is sufficiently compel-

318. 102 S. Ct. at 274-78.

319. See *supra* notes 252-54, 272 and accompanying text.

320. *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring); see *supra* text accompanying note 272.

ling should include the type of weighing analysis suggested in this comment.³²¹

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321. *See supra* notes 238-78 and accompanying text.